SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 587.

DAMSELLE HOWARD, ADMINISTRATRIX OF WILL HOWARD, DECEASED, PLAINTIFF IN ERROR,

vs.

THE ILLINOIS CENTRAL RAILROAD COMPANY, AND THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

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1 to 3 In the Circuit Court of the United States, for the western division of the western district of Tennessee.

DAMSELLE HOWARD *vs.* Y. & M. V. R. R. Co., I. C. R. R. Co., AND J. D. Trimble.	No. 3861. Law.

Transcript from the Circuit Court of Shelby County, Tennessee. Filed October 4th, 1906. Dan F. Elliotte, clerk.

STATE OF TENNESSEE:

Pleas, at a term of the Circuit Court of Shelby County, Division 2, State aforesaid, begun and held at the court-house, in the city of Memphis, on Monday, the 17th day of September, 1906, the same being the third Monday in September, 1906, present and presiding the Hon. Walter Malone, judge, etc. Also present L. P. Thompson, clerk of said court, and F. L. Monteverde, sheriff of Shelby County, when the following proceedings were had, to wit:

Paupers oath affidavit.

DAMSELLE HOWARD *vs.* YAZOO & MISSISSIPPI VALLEY RAILROAD CO. ET AL.

I, Damselle Howard, do solomnly swear that I am a resident citizen of the State of Tennessee; that owing to my poverty I am unable to bear the expense of this suit which I am about to commence in the Circuit Court of Shelby County, Tennessee; and that I am justly entitled to the redress sought to the best of my knowledge and belief.

DAMSELLE HOWARD.

Sworn to and subscribed before me this the 18th day of July, 1906.

[SEAL.] R. J. BLACK, *Notary Public.*

4 *Summons.*

State of Tennessee. To the sheriff of Shelby County, greeting:

You are hereby commanded to summon the Yazoo & Mississippi Valley Railroad Company, and the Illinois Central Railroad Company and J. D. Trimble, if to be found within your county, personally to be and appear before the judge of the Circuit Court of Shelby County, at a term of said court to be held for said county, at the court-house in the city of Memphis, on the third Monday in September next, then and there to answer Damselle Howard in an action to her damage in the sum of ($20,000.00) twenty thousand dollars.

Herein fail not, and have you then and there this writ.

Witness, L. E. Boswell, clerk of said court, at office, the third Monday in May, 1906.

L. E. BOSWELL, *Clerk*,
By WM. REISSER, *Deputy Clerk*.

Issued 19 day of July, 1906. L. E. Boswell, Clerk. Wm. Reisser, D. C.

Sheriff's return.

Came to hand 19 day of July, 1906, executed on Y. & M. V. & I. C. R. R. Co., by reading said writ to M. Gilleas, 3rd vice prest., he being the highest officer to be found in my county, this 16th day of Aug., 1906. Further executed by reading said writ to J. D. Trimble this 17th day of Aug., 1906.

F. L. MONTEVERDE, *Sheriff*.
THOS. DWYER, *D. S.*

5 In the Circuit Court of Shelby County, Tennessee.

DAMSELLE HOWARD,
vs.
Y. & M. V. R. R. Co., I. C. R. R. Co., AND J. D. Trimble.

Declaration. Filed Sept. 17, 1906. L. P. Thompson, clerk.

Damselle Howard, plaintiff, suing the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company and James D. Trimble, defendants, declares that plaintiff and defendant J. D. Trimble are resident citizens of Shelby County, Tennessee, and defendant Y. & M. V. R. R. Co. and Illinois Central Railroad Company are corporations owning and operating lines of railroad into and through said county of Shelby, State of Tennessee.

Heretofore, to wit, on or about the 27th of June, 1906, the defendant railroad companies were common carriers, doing business between the several States of the Union, to wit, Illinois, Kentucky, Tennessee, and Mississippi, and on or about said date one Will Howard was employed as a fireman by said defendants upon an interstate train running through Tennessee into Mississippi and carrying passengers and freight for hire, and while the said Will Howard was in the exercise of due care and diligence, and while performing his duties as fireman for said defendant railroad, he was by the negligence of said defendant railroads and J. D. Trimble so injured that he lingered and died.

The negligence of the defendant railroads consisted in running into the passenger train upon which Will Howard was a fireman another train which was operated by the said J. D. Trimble, who was at that time engaged in switching operations in the southern outskirts of the city of Memphis. At the time of the injury the

said Will Howard was firing a locomotive engaged in pulling an excursion train from Memphis, Tennessee, to some point in
6 Mississippi, or engaged in running from some point in the State of Mississippi to the city of Memphis, Tennessee, upon said excursion train.

The defendant J. D. Trimble was negligent in operating his train upon the track so as to cause a collision between the said excursion train and said switch train.

The defendant railroad companies were also negligent in furnishing for the use of their servants defective trains with defective brakes, which would not work properly so as to enable the engineer or driver upon the excursion train to speedily stop the same when the danger first appeared.

The plaintiff Damselle Howard is the widow of Will Howard, deceased.

The deceased left surviving him his widow, the plaintiff, and a child of tender years.

At the time of his death the deceased was a man in vigorous health, and earning $90.00 per month.

By reason of the wrongs and injuries aforesaid plaintiff has been deprived of her husband, who was her only means of support; to her great damage, $20,000.00, for which she sues and demands a jury to try the case.

BELL, TERRY, ANDERSON & BELL,
Attorneys for the Plaintiff.

In the Circuit Court of Shelby County, Tennessee, Division 2.

DAMSELLE HOWARD, PLAINTIFF, *vs.* Y. & M. V. R. R. COMPANY, I. C. R'D Company, and J. D. Trimble, defendants.	Petition for removal. Filed Sept. 21, 1906. C. A. Boswell, D. C.

To the honorable Walter Malone, judge of the Circuit Court of Shelby County, Tennessee, presiding in division No. 2:

Your petitioner, the Illinois Central Railroad Company,
7 respectfully shows that it was duly incorporated by an act of the general assembly of the State of Illinois, approved February 10, 1851, and that it has never been incorporated by or under the laws of the State of Tennessee; that it is a defendant in the above-entitled suit.

Your petitioner, the Yazoo & Mississippi Valley Railroad Company, respectfully shows that it was duly incorporated by an act of the general assembly of Mississippi, approved February 17, 1882, and that it has never been incorporated by or under the laws of the State of Tennessee; that it is one of the defendants in the above-entitled suit.

Your petitioner, J. D. Trimble, shows that he is now, and was on the 19th day of July, 1906, and on the 17th day of August, 1906, a citizen and resident of the State of Kentucky, and a nonresident of

the State of Tennessee, having his residence then and now in the city of Louisville, Kentucky.

The above petitioners respectfully show to your honor that they are all of the defendants sued in the above cause, and that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars; that said suit is of a civil nature at common law, it being brought by said Damselle Howard against your petitioners to recover damages in the sum of twenty thousand dollars for personal injuries sustained by Will Howard, as follows:

It being alleged in the declaration filed by said plaintiff that your petitioners, the Y. & M. V. R'd Company and the I. C. R'd Company, were on the 27th day of June, 1906, common carriers engaged in interstate traffic between the States of the Union, to wit: Illinois, Kentucky, Mississippi, and Tennessee, and on or about the date alleged Will Howard, husband of the plaintiff, was employed as fireman by the defendant railroad companies upon an interstate train, engaged in interstate traffic between the States of Tennessee and Mississippi, and that while so engaged he was injured by
8 the negligence of the petitioning railroad companies and J. D. Trimble, so that as a result of said injuries, after lingering, the said Howard died.

The negligence averred in said declaration as to the petitioning railroad companies is that the said Will Howard was engaged as a fireman upon a passenger train, firing the locomotive engine which was hauling an excursion train between Memphis and some point in Mississippi, and that while so engaged the said J. D. Trimble, in charge of a locomotive engaged in switching operations on the outskirts of Memphis, ran said engine into the train which was being fired by the said Will Howard, by reason of which the accident occurred. The negligence of the said Trimble, as averred, was the operation of the said switch engine upon the track so as to cause a collision between said excursion train and said switch engine.

II.

Your petitioners aver that there is a separable controversy in the above suit between the petitioners, in that the liability of the railroad companies is predicated solely and alone upon an act of Congress, to wit, "An act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employés," approved June 11, 1906, whereas the liability of the said Trimble to the plaintiff is not made to depend upon said act of Congress. Under the decisions of the State of Tennessee and of the Federal courts, and but for the said act of Congress hereinafter designated as the employers' liability act, the said Trimble and the deceased Howard were fellow-servants, and the petitioners, the Y. & M. V. R'd Company and the I. C. R'd Company, were not liable for the injuries which may have been inflicted by reason and on account of the negligence of a fellow-servant, and

were not liable for the injuries inflicted upon Howard by Trimble, and no liability could be predicated as against these companies for the injuries inflicted by said Trimble or by his negligence save and alone under the said employers' liability act.

9 III.

Your petitioners further aver that from the plaintiff's statement of her own case in the declaration filed herein, there is presented a Federal question, to wit, a case arising under and by virtue of the Constitution and the laws of the United States. By the said statement of the plaintiff's case contained in the declaration herein, it is averred that the plaintiff's intestate was at the time of the accident engaged as a fireman upon a locomotive engine of the defendant companies, which locomotive engine was at the time of his injury engaged in commerce between the States, to wit, that it was hauling an excursion train between points in Mississippi and the State of Tennessee. It is further averred that the defendant railroad companies are common carriers between the States of Mississippi and Tennessee, and other States of the Union.

It is further averred that the said J. D. Trimble was at the time of the accident engaged in the operation of a switch engine in the city of Memphis, and was, therefore, under the laws of the State of Tennessee, and the United States, and the decisions of the several courts of the State of Tennessee, and of the Federal courts, a fellow-servant with the deceased, and the liability in the plaintiff's declaration predicated against the companies arises under and by virtue of an act of Congress entitled "An act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employés," approved June 11, 1906, and the determination of said controversy involves the construction and interpretation of the said law, which has not been construed or passed upon by the Supreme Court of the United States.

IV.

Your petitioners further aver that in the above-mentioned suit there is a controversy which is wholly between citizens of dif-
10 ferent States and which can be fully determined between them, to wit, a controversy between your said petitioners, who were at the time of the commencement of said suit, and still are, non-residents of the State of Tennessee, and are citizens of other States, to wit, the I. C. R'd Company is a citizen of the State of Illinois; the Y. & M. V. R. R. Company, a citizen of the State of Mississippi, and J. D. Trimble, a citizen of the State of Kentucky, and the said Damselle Howard, who your petitioner avers, was at the commencement of this suit, and still is, a citizen of the State of Tennessee, and that both said Damselle Howard and your petitioners are actually interested in the controversy involved in this suit.

V.

Your petitioners further aver that the said Circuit Court of Shelby County is a court of the State of Tennessee, that this suit is now pending in said court, and that this petition is filed in said court at the time or before your petitioners are required by the laws of the State of Tennessee or the rule of said State court in which this suit is brought to answer or plead to the declaration or complaint of said plaintiff.

Your petitioners offer herewith a bond, with good and sufficient surety, for its entering in the Circuit Court of the United States for the Western District of Tennessee, at Memphis, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said United States Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto, and for your petitioners then and there appearing and entering special bail in this suit, if special bail was originally requisite therein.

Your petitioners pray that this court proceed no further herein, except to make an order of removal and to accept the said surety and bond, and to cause the record herein to be removed into said
11 Circuit Court of the United States in and for the Western District of Tennessee, at Memphis.

ILLINOIS CENTRAL RAILROAD COMPANY,
By W. H. FITZHUGH, *Atty.*
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
By W. H. FITZHUGH, *Atty.*
J. D. TRIMBLE,
By W. H. FITZHUGH, *Atty.*

C. N. BURCH,
A. W. BIGGS,
COOPER & FITZHUGH,
Attorneys.

Bond.

In the Circuit Court of Shelby County, Tenn., Division No. 2.

DAMSELLE HOWARD, PLAINTIFF, *vs.* THE Y. & M. V. R. R. Co., Illinois Central Railroad Company and J. D. Trimble, defendants.	Bond for removal of this cause to the United States Circuit Court, filed Sept. 21, 1906. C. A. Boswell, D. C.

Know all men by these presents that Illinois Central Railroad Company, the Y. & M. V. R. R. Company, and J. D. Trimble, as principals, and Albert W. Biggs, as surety, are held and firmly bound

unto Damselle Howard, and all persons whom it may concern, in the penal sum of two hundred and fifty dollars, for the payment of which, well and truly to be made, we bind ourselves, our successors,
12 heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: That said Illinois Central Railroad Company et al. having petitioned the Circuit Court of Shelby County, State of Tenn., for the removal of a certain cause therein pending, wherein Damselle Howard is plaintiff and the Illinois Central Railroad Company et al. are defendants, to the Circuit Court of the United States in and for the Western District of Tenn.

Now, if the said Illinois Central Railroad Company et al., your petitioners, shall enter in the said Circuit Court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall then and there appear and enter special bail in said suit if special bail was originally requisite therein, then this obligation to be void; otherwise to be and remain in full force and virtue.

Witness our hands and seals, this 21st day of Sept., 1906.

ILLINOIS CENTRAL RAILROAD COMPANY,
By ALBERT W. BIGGS, *Attorneys.* [SEAL.]
THE YAZOO & MISS. VALLEY R. R. CO., [SEAL.]
By ALBERT W. BIGGS, *Atty.* [SEAL.]
J. D. TRIMBLE,
By ALBERT W. BIGGS, *Atty.*
ALBERT W. BIGGS, *Surety.*

13 *Justification of surety.*

STATE OF TENN., *Shelby County:*

I, Albert W. Biggs, of said county, the surety named in the foregoing bond, being duly sworn, depose and says that I am a resident of the State of Tenn., and a property holder therein; that I am worth the sum of five hundred dollars, over and above all my debts and liabilities, and exclusive of property by law exempt from execution; that I have property in said State, liable to execution, of the value of more than five hundred dollars.

ALBERT W. BIGGS.

Sworn to and subscribed before me this 21st day of Sept., 1906.

C. A. BOSWELL,
Deputy Clerk Circuit Court Shelby County, Tenn.

Order for removal.

DAMSELLE HOWARD
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD Company et al. } September term, 1906.

SATURDAY, *September 29, 1906.*

The defendants, the Yazoo & Mississippi Valley R. R. Co., Illinois Central Railroad Company, and J. D. Trimble, by their attorney, presented in open court their petition for the removal of this suit from this court to the Circuit Court of the United States for the Western District of Tennessee, and also a bond, with good and sufficient surety in the penal sum of two hundred and fifty dollars, conditioned as required by the act of Congress in such case made and provided; and this being at or before the time said defendants are required by the laws of the State of Tennessee of the rule of this court, to answer or plead to the declaration or complaint of the plaintiff in this suit, it is ordered and adjudged by this court that said petition be filed; that said bond (which has been duly
14 proven in open court) be accepted; that this suit be removed from this court to the Circuit Court of the United States for the Western District of Tenn., at Memphis; that the clerk of this court forthwith transmit to that court a full, true, and perfect copy of the record in this suit, duly certified according to law; and that no further proceedings be had in this suit in this court.

STATE OF TENNESSEE:

I, L. P. Thompson, clerk of the Circuit Court of Shelby County, hereby certify that the foregoing 14 pages of words and figures contain a full, true, and complete transcript of all the records and proceedings had in the suit therein named wherein Damsell Howard is plaintiff and the Yazoo & Miss. Valley et al. defendants, as the same appears of record, and on file in my office.

In testimony whereof I hereto subscribe my name and affix the seal of said court, at my office in the city of Memphis, Shelby County, this the 4th day of October, 1906.

L. P. THOMPSON, *Clerk.*

15 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee. To the November term, 1906.

DAMSELL HOWARD,
vs.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD Co. et al. } Plea. Filed Nov. 22, 1906. Dan F. Elliotte, clerk.

And the said defendants, the Illinois Central Railroad Company, and the Yazoo & Mississippi Valley Railroad Company, come and defend the wrong and injuries when, etc., and for a plea in this

behalf say, that they are not guilty of the wrongs and injuries in the plaintiff's declaration set forth, in manner and form as the plaintiff hath complained, and of this they put themselves upon the country, and the plaintiff doth the like.

2. And the said defendants, the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, for a further and other plea say: That the injuries sustained by the said Will Howard, in the declaration mentioned, were sustained and inflicted, if at all, by reason of the negligence of J. D. Trimble, who, at the time of said injury, was a fellow-servant of the said Will Howard, engaged in operating the train on which the said Will Howard was also engaged as a servant, and for such injuries so received these defendants are not in law liable to the plaintiff, and this the said defendants are ready to verify.

Wherefore, etc.,

TIM E. COOPER,
Attorney for Defendants.

16 United States of America, Western Division of the Western District of Tennessee.

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1906, at the United States courthouse in the city of Memphis, in said district, on, to wit, the 4th day of December, A. D. 1906, in the following cause, to wit:

DAMSELLE HOWARD, *vs.* ILLINOIS CENTRAL RAILROAD COMPANY ET AL.	Order allowing plaintiff to file an amended declaration.

Upon application of the plaintiff to amend the declaration filed in this case, it is order'd by the court that the declaration be so amended as to allow the case to proceed in the name of Damselle Howard, administratrix of the estate of Will Howard, deceased, it appearing to the court that Damselle Howard, plaintiff, and widow of Will Howard, deceased, was appointed administratrix of the estate of her said husband, Will Howard, by the probate court of Shelby County, Tennessee, on the 18th day of July, 1906, and this amendment is made to enable the said plaintiff to conduct the further prosecution of this suit as the personal representative of the said deceased.

17 In the United States Circuit Court for the Western Division of the Western District of Tennessee.

DAMSELLE HOWARD, ADM'R'X OF THE estate of Will Howard, deceased, *v.* THE ILLINOIS CENTRAL RAILROAD Co. and Yazoo & Mississippi Valley Railroad Co.	Amended declaration. Filed Dec. 4, 1906. Dan F. Elliotte, clerk.

Leave of the court having first been had and obtained, comes now the plaintiff and files this, her amended declaration, and for amendment says:

Plaintiff, Damselle Howard, administratrix of the estate of Will Howard, deceased, suing The Illinois Central Railroad Company and The Yazoo & Mississippi Valley Railroad Company, defendants, declares that plaintiff is a resident citizen of Shelby County, Tennessee, and is the duly appointed, qualified, and acting administratrix of the estate of Will Howard, deceased, and her letters of administration issued out of the Probate Court of Shelby County, Tennessee, are here to the court shown; and the defendant' are railroad corporations engaged in interstate trade and commerce between the several States of the Union, and especially between the States of Tennessee and Mississippi.

Heretofore the said Will Howard, deceased, plaintiff's intestate, was in the employ of the defendants as a fireman upon one of their interstate passenger trains, to wit, a passenger train running between the city of Memphis, in the State of Tennessee, and various points in the State of Mississippi; and on or about the 27th day of June, 1906, while the said Will Howard was engaged in the performance of his duties as fireman for the defendants, the defendants so
18 negligently conducted themselves, and so negligently managed the operation of their said train, that their said train was caused to collide with another engine and train of cars, which said collision, negligently produced, as aforesaid, inflicted upon plaintiff severe and fatal injuries, from the result of which he lingered and died.

The negligence of the defendants consisted in the operation of their said trains so as to produce a collision, without fault upon the part of the deceased Will Howard and while the said Will Howard was in the exercise of due care and diligence.

The said deceased left surviving him a widow and an infant child. He was a man in vigorous health; industrious, sober, domestic, and provident.

Wherefore plaintiff has been damaged in the sum of twenty thousand ($20,000.00) dollars, for which she sues and demands a trial by jury.

BELL, TERRY, ANDERSON & BELL,
Attorneys for the Plaintiff.

19 United States of America. Western Division of the Western District of Tennessee.

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1906, at the United States court-house in the city of Memphis, in said district, on, to wit, the 5th day of December, 1906, in the following cause, to wit:

DAMSELLE HOWARD, ADMX., ETC., *vs.* ILLINOIS CENTRAL R. R. CO. ET AL.	No. 3861.

This cause came on to be heard on this 5th day of December, 1906, upon motion of the defendant, the Illinois Central Railroad Company and the Yazoo and Mississippi Valley Railroad Company, to strike out said declaration for uncertainty and duplicity, or to require the plaintiff to make more specific, certain, and definite the allegations of said amended declaration, so that the defendants might know whether the plaintiff was prosecuting this suit under the common law, a State statute, or the act of Congress approved June 11th, 1906, known as the employers' liability act; which motion the court overruled, the court being of the opinion that said declaration was not insufficient on account of uncertainty, indefiniteness, or duplicity; to which action of the court the defendants excepted.

20 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

DAMSELLE HOWARD, ADMINISTRATRIX OF the estate of Will Howard, deceased, *vs.* ILLINOIS CENTRAL RAILROAD COMPANY, and the Yazoo & Mississippi Valley Railroad Company.	Demurrer. Filed Dec. 7, 1906. Dan F. Elliotte, clerk.

The Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, for demurrer to the amended declaration filed in this cause, say:

1. The declaration is fatally defective in that it fails to state for whose use and benefit this suit is brought, and also fails to state the names of the widow and infant child referred to in the amended declaration.

2. The right of action sought to be prosecuted in this cause is one which at common law died with plaintiff's intestate, and there is no averment in the amended declaration of any statute by virtue of

which this action can be maintained by the administratrix of the deceased.

3. The amended declaration shows that it is an action to recover damages for death by wrongful act, and fails to state where or in what State said wrongful act was committed, and that there was a statute in such State giving a right of action to the personal representative of the party, who met his death by wrongful act, to recover damages.

4. The amended declaration, in so far as it may be based on the common law, is fatally defective in that it fails to allege that the negligence complained of was the negligence of such servants or agents of the defendants as stood in the positions of vice-
21 principals, that is, such servants or agents for whose negligence the defendants can be held liable.

5. The amended declaration, in so far as it is based on the act of Congress approved June 11, 1906, and entitled "An act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employes," states no cause of action for the reason that said act of Congress is unconstitutional and void, in that—

(a) Congress was without power to pass said act.

(b) Said act is not a regulation of commerce with foreign nations and among the several States and among the Indian tribes, and not within the power of Congress to enact under article 1, section 8, subsection 3, of the Constitution of the United States.

(c) Said act fails to prescribe any rules of conduct as to common carriers engaged in interstate commerce and to fix criminal or civil liability upon common carriers for failure to comply with such rules of conduct, but without regulating interstate commerce is an attempt to establish the administration of the law of torts as between common carriers and their employes.

(d) Said act makes no distinction between the liability of common carriers to their servants, who may at the time be engaged in interstate commerce, and the liability of common carriers to their servants who may at the time be engaged in intrastate commerce, and the liability of common carriers to their servants who may at the time not be engaged in commerce at all; but the sole test of liability is made to depend upon whether the common carrier engages in interstate commerce.

(e) Said act is a regulation of intrastate commerce.

22 (f) Said act is in contravention of the ninth amendment of the Constitution of the United States, the reading as follows:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

(g) Said act is in contravention of the tenth amendment of the Constitution of the United States, reading as follows:

"The powers not delegated to the United States by the Constitu-

tion, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

(h) In said act Congress attempts to exercise powers and rights which never have been delegated to the United States by the Constitution of the United States, said powers and rights being retained by the people and reserved to the States and the people.

(i) Said act violates that portion of the fifth amendment of the Constitution of the United States which prohibits any person from being deprived of life, liberty, or property without due process of law.

(j) Said act makes an arbitrary and capricious classification of all common carriers engaged in interstate commerce, regardless of whether the operations of all common carriers are dangerous or not.

(k) Said act imposes different and greater liability upon common carriers engaged in interstate commerce than upon other persons engaged in interstate commerce, and takes away from common carriers engaged in interstate commerce defenses of personal-injury suits available to other persons engaged in interstate commerce.

(l) Said act violates the seventh amendment of the Constitution of the United States, reading as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

(m) Said act prohibits the rules of the common law being applied in the reexamination in any court of the United States in any case arising under said act.

23

CHAS. N. BURCH,
ALBERT W. BIGGS,
Attorneys.

Charles N. Burch and Albert W. Biggs certify that we are counsel for the defendants, the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, in the above-mentioned cause, and that in their opinion the foregoing demurrer is well founded in point of law.

CHAS. N. BURCH,
ALBERT W. BIGGS.

W. L. Smith makes oath that he is the general agent of the Illinois Central Railroad Company and of the Yazoo & Mississippi Valley Railroad Company, and that the foregoing demurrer is not interposed for delay.

W. L. SMITH.

Subscribed and sworn to before me by W. L. Smith this 7th day of December, 1906.

[SEAL.]

E. C. TURNER,
Notary Public.

24 United States of America, Western Division of the Western District of Tennessee.

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1906, at the United States court-house in the city of Memphis, in said district, on, to wit, the 10th day of December, A. D. 1906, in the following cause, to wit:

DAMSELLE HOWARD, ADMINISTRATRIX OF THE ESTATE of Will Howard, deceased.
vs.
ILLINOIS CENTRAL RAILROAD COMPANY AND THE Yazoo & Mississippi Valley Railroad Company.
} No. 3861.

In this cause the defendants moved the court to withdraw, as of the date November 22, 1906, the pleas filed by them on that day, which motion the court allowed, and the same are withdrawn nunc pro tunc.

25 United States of America, Western Division of the Western District of Tennessee.

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1906, at the United States court-house in the city of Memphis, in said district, on, to wit, the 11th day of December, 1906, in the following cause, to wit:

DAMSELLE HOWARD
vs.
THE ILLINOIS CENTRAL R. R. Co.
} No. 3861.

In this cause came the United States district attorney for this district and announced to the court that the Department of Justice of the United States desired to intervene for the purpose of supporting the constitutionality of the employers liability act, which is involved in this suit, and requested the court to grant leave to the Department of Justice to intervene for the purpose stated. And it appearing to the court that counsel for both plaintiff and defendant, having no objection, consent to such intervention, it is accordingly ordered that the Department of Justice of the United States be, and it is hereby, permitted to intervene in this case and to have such of its representatives as it may desire appear in this cause for

the purpose of orally arguing to the court the constitutionality of the said act and to file briefs.

26 United States of America, Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1906, at the United States courthouse in the city of Memphis, in said district, on, to wit, the 20th day of December, 1906, in the following cause, to wit:

DAMSELLE HOWARD, ADMINISTRATRIX OF THE ESTATE OF Will Howard, deceased, *vs.* THE ILLINOIS CENTRAL RAILROAD COMPANY AND YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.	No. 3861.

Came the parties by their attorneys, whereupon the plaintiff made application to amend her amended declaration so as to state the name of the widow and minor child, for whose use and benefit this suit is brought, to wit, Damselle Howard, the widow of Will Howard, deceased, who is also the administratrix and plaintiff, and Willie May Queen Victoria Howard, the minor child of plaintiff and the deceased, Will Howard; and also upon the application of plaintiff to amend her said amended declaration so as to show that the collision which resulted in the death of said Will Howard occurred in Shelby County, Tennessee; and also to amend said amended declaration so as to show that the negligence of the defendants complained
27 of was the negligence of a fellow-servant of said Will Howard, to wit, the engineer of the interstate train upon which Will Howard was acting as fireman; and also to show that plaintiff bases her right of action exclusively upon the act of Congress approved June 11th, 1906, and entitled "An act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between States and foreign nations to their employes." All of which amendments the court was pleased to allow. Whereupon the defendant stated in open court that the first four grounds of demurrer were abandoned by defendants.

Plaintiff further, by counsel, moved to dismiss her suit so far as the defendant J. D. Trimble is concerned, which motion the court is pleased to allow.

28 In the United States Circuit Court for the Western Division of the Western District of Tennessee.

DAMSELLE HOWARD, ADM'R'R OF THE ESTATE of Will Howard, deceased. *vs.* THE ILLINOIS CENTRAL RAILROAD CO. and Yazoo & Mississippi Valley Railroad Co.	No. 3861. Filed Dec. 20, 1906. Dan F. Elliotte, clerk.

Amended declaration as amended and finally filed.

Leave of the court having first been had and obtained, comes now the plaintiff and files this her amended declaration, and for amendment says:

Plaintiff, Damselle Howard, administratrix of the estate of Will Howard, deceased, suing the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, defendants, declares that plaintiff is a resident citizen of Shelby County, Tennessee, and is the duly appointed, qualified, and acting administratrix of the estate of Will Howard, deceased, and her letters of administration issued out of the probate court of Shelby County, Tennessee, are here to the court shown; and the defendants are railroad corporations engaged in interstate trade and commerce between the several States of the Union, and especially between the States of Tennessee and Mississippi.

Heretofore, the said Will Howard, deceased, plaintiff's intestate, was in the employ of the defendant as a fireman upon one of their interstate passenger trains, to wit, a passenger train running between the city of Memphis, in the State of Tennessee, and various points in the State of Mississippi; and on or about the 27th day of June, 1905,
29 while the said Will Howard was engaged in the performance of his duties as fireman for the defendants, the defendants so negligently conducted themselves, and so negligently managed the opreation of their said train, that their said train was caused to collide with another engine and train of cars in Shelby County Tennessee, which said collision negligently produced as aforesaid inflicted upon plaintiff severe and fatal injuries, from the result of which he lingered and died.

The negligence of the defendants consisted in the operation of their said train by a fellow-servant of deceased, to wit, the engineer on said interstate train, so as to produce a collision, without fault upon the part of the deceased, Will Howard, and while the said Will Howard was in the exercise of due care and diligence. Wherefore, the plaintiff has a right of action and sues the defendants under and by virtue

of an act of Congress approved June 11th, 1906, and entitled "An act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employes."

That said deceased left surviving him a widow, Damselle Howard, plaintiff, and an infant child, Willie May Queen Victoria Howard. He was a man in vigorous health, industrious, sober, domestic, and provident.

Wherefore, plaintiff has been damaged in the sum of twenty thousand ($20,000.00) dollars, for which she sues and demands a trial by jury.

BELL, TERRY, ANDERSON & BELL,
Attorneys for Plaintiff.

30 In the Circuit Court of the United States, Western District of Tennessee, Western Division.

DAMSELLE HOWARD, ADMINISTRATRIX,
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY ET AL. } No. 3861.

Opinion sustaining demurrer to declaration.

Filed January 3rd, 1907, Dan F. Elliotte, clerk.

For certain wrongs and injuries inflicted by the defendant railroad companies upon a locomotive fireman, Will Howard, one of their employees, and from which he died, the plaintiff, as the administratrix of said Howard, sues the defendants for damages, under and by virtue of an act of Congress approved June 11, 1906, and entitled "An act relating to liability of common carriers, * * * engaged in commerce between the States, * * * to their employees," and which is commonly known as the "employer's liability act."

To the declaration the defendants interpose a demurrer. Without setting out here the demurrer verbatim, it is sufficient to state the grounds thereof, as summed up by the defendants' counsel in their brief, under four general heads, as follows:

(I) The act of Congress of June 11, 1906, is not a regulation of commerce, and is unconstitutional and void.

(II) The act is unconstitutional in that it makes no distinction between interstate commerce and intrastate commerce, and if a regulation of commerce at all, it regulates intrastate as well as interstate commerce.

(III) The act is unconstitutional in that it violates the fifth
31 amendment of the Constitution of the United States, which provides that:

"No person shall * * * be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

(IV) The act is unconstitutional in that it contravenes the seventh amendment to the Constitution of the United States, which provides that:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law."

We have here the constitutionality of the act of June 11, 1906, singly and sharply raised.

The question as to whether or not this particular plaintiff is entitled to a verdict upon the facts in this case, or whether common carriers engaged in interstate trade or commerce should be made liable in this and similar cases are of small consequence in comparison to the question raised by the demurrer.

For above and beyond in its importance to all the people of the United States is the question, Is Congress authorized to enact the law under consideration by virtue of the power delegated to it in article 1, section 8, clause 3, of the Constitution of the United States, which provides "That Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes?"

Manifestly, neither the merits nor the demerits of the act should be considered in determining its constitutionality.

It is unnecessary to cite authorities in support of the propo-
32 sitions that Congress has no powers except those expressly delegated to it, or necessarily and clearly implied from powers expressly granted. Hence it follows that if Congress is empowered to enact the legislation under consideration that power must be expressly conferred by the Constitution, or is clearly incident to some power which is expressly given. (Gibbons vs. Ogden, 9 Wheaton, 1.)

Unquestionably, Congress has the power to regulate commerce between the several States, because that power is expressly granted by the Constitution. As is said in Veazie and Young vs. Moore (14 Howard, 568), "The design and effect of that power, as evinced in the history of the Constitution, was to establish a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies or local and partial interests might be disposed to introduce and maintain."

To the same effect is Railroad Company vs. Richmond (19 Wallace, 584).

What is this power? This question was asked by Chief Justice Marshall in the masterly opinion delivered by him in the case of Gibbons vs. Ogden (9 Wheaton, 1), and which opinion has been the chart of the bench and bar since that time in all cases of this character.

The answer to the question is terse: "It is the power to regulate," he said; "that is, to prescribe the rule by which commerce is to be governed."

In defining the extent of this power the eminent Chief Justice says:

"This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed by the Constitution."

The sovereignty of Congress over the objects delegated to it is plenary, and the power over commerce between the several States is vested in Congress as absolutely as it would be in a single
33 government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." (Gibbons vs. Ogden, supra.)

Without citing the great array of cases which support the proposition, we may restate the well-settled rule that Congress has full, ample, and plenary power to regulate interstate commerce, and, therefore, to regulate the business of interstate commerce as carried on by common carriers.

What is meant by the power to regulate commerce? As has been seen, it is the power to prescribe rules by which commerce is to be governed.

(Gibbons vs. Ogden, supra; Welton vs. Missouri, 90 U. S., 279.)

But what is this commerce for the regulation of which Congress has power to prescribe rules, when carried on between the States? This brings us face to face with the bone of contention in the case. With that question answered correctly, the remainder of the way is comparatively smooth.

"Commerce is the exchange, or the buying and selling of commodities; intercourse." (Webster.)

"Commerce undoubtedly is traffic; but it is something more, it is intercourse." (Gibbons vs. Ogden, supra.)

"Transportation of freight and passengers is commerce." (Wabash, St. L. & P. R. R. Co. vs. Ill., 118 U. S., 557.)

Interstate commerce is the trading and trafficking in commodities between and amongst citizens of different States. It is transporting by common carriers passengers and property from one State into another State. It is the selling and buying of a commodity, or commodities, by a citizen of one State to a citizen of another State, which commodity is to be transported from the State of the seller to
34 the buyer, or to another State, and there resold, or used, as may serve the purpose of the buyer. The citizen may be an individual, firm, or corporation.

Welton vs. Missouri, 91 U. S., 275.

Mobile County vs. Kimball, 102 U. S., 691.

Glouster Ferry Co. vs. Pennsylvania, 114 U. S., 196.

Wabash, St. L. & P. R. R. Co. vs. Ill., 118 U. S., 557.

Hopkins vs. United States, 171 U. S., 597.

These definitions do not solve the problem here. The interstate feature of it may be and perhaps is, sufficiently clear. But, manifestly, the character of commerce legislated about, or on, by the act in question is not of the varieties or kinds heretofore mentioned.

The commerce mentioned and referred to in the act of June 11, 1906, is the liability of common carriers, engaged in interstate trade or commerce, to their employees.

Congress, by the enactment of this law, assumed that this liability is commerce, or so related to, or connect with it, as to fall within the power of Congress as a proper subject for its legislation under article 1, section 8, clause 3, of the Constitution of the United States.

The demurrant challenges the correctness of this position, and insists that the liability of the employer to the employee for injuries is not commerce at all, and that Congress exceeded its authority under the Constitution in enacting the law in question.

No case of the Federal Supreme Court, holding that such liability is commerce within the meaning of the commerce clause of the Federal Constitution, has been cited, and I know of none.

The Supreme Court of the United States has, in cases on writs of error to the State courts, repeatedly upheld the decisions of the State supreme courts, where the latter courts have sustained the validity of the State statutes which altered the common law rule
35 in regard to common carriers and made them liable to their employees for injuries, much in the same fashion as is done by the act under consideration.

Missouri Pacific Ry. Co. vs. Mackey, 127 U. S., 205.

Minneapolis & St. L. Ry. Co. vs. Herrick, 127 U. S., 210.

Tullis vs. Lak. and Western R. R. Co., 175 U. S., 348.

It does not follow, however, that because the United States Supreme Court upheld the validity of these State statutes, that that is tantamount to deciding that a Federal statute to the same purport and effect would be valid. What was decided in all, or in many of these cases, was that such State legislation did not undertake to regulate interstate commerce, and was not obnoxious to the Constitution or to any law of the United States for that reason.

This would necessarily be so under the well-known rule that the Supreme Court will follow the decision of the Supreme Court of a State in its construction of its own statutes and constitution, unless such statute or constitution is obnoxious to the Constitution or laws of the United States.

It would not necessarily follow therefor, that because it has been held in several of the States that the liability of common carriers for injuries to their employees is a proper subject for State governmental regulation, and these State decisions not having been disturbed by the Supreme Court of the United States on review, that the liability of common carriers for injuries to their employees is a proper subject for Federal governmental regulation, for the very simple reason that many things are subject to State governmental control which are not subject to Federal control.

I am unable to bring my mind to the conclusion that the liability of a common carrier to its employees for injuries is interstate commerce or commerce of any character within the meaning of the commerce clause of the Constitution.

36 It is insisted that the relation between common carriers and their employees more or less affects interstate commerce and that this legislation more or less affects interstate commerce, and for that reason it is within the power of Congress to regulate it.

Chief Justice Fuller, speaking for the court in Williams vs. Fears (179 U. S., 278), says:

"If the power to regulate interstate commerce applied to all incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States and would exclude State control over many contracts purely domestic in their nature."

In the case of Sherlock vs. Alling (93 U. S., 99) the court says:

"Legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution."

See also State Tax case (15 Wallace, 293), to the same effect.

Congress has the power to regulate—that is, to prescribe rules by which commerce is to be governed.

Under this construction of the interstate-commerce clause of the Constitution the "safety appliance act" was passed. That act has been acquies'ed in, if not sustained, by the Supreme Court of the United States. Perhaps its validity has not been questioned.

The fact that the safety appliance act imposes a liability upon common carriers, and the further fact that that act has passed muster before the Supreme Court of the United States and by that court its provisions have been enforced, does not necessarily warrant the conclusion that the employers' liability act should be sustained.

Our attention is called to that act, and the insistence is made that the safety appliance act and the employers' liability act are the same in character. And if it is within the power of Congress to enact the former it must have the power to enact the latter.

37 There is a vast difference between the two enactments. In the safety appliance act Congress lays down specific rules and regulations with which common carriers are required to comply. For a failure to observe such rules or perform such duties prescribed by Congress for the conduct and government of its business a penalty is provided, which may be recovered by the United States Government, and in addition it provides:

"That any employee of any common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier, after the unlawful use of such locomotive, car, or train has been brought to his knowledge."

There the carrier is made liable to the employee, not simply because he is injured, but, rather, because the carrier violates and sets at naught the rules for the government of its business, prescribed by

Congress, and because, as a result of such violation, the employee was injured.

This liability, in its nature and essence, is a penalty.

The power of Congress to prescribe a penalty for the infraction of a rule or regulation which it is empowered to enact by the express terms of the Constitution is clearly and necessarily implied, but if it was not so implied, then authority for its enactment is found in clause 18, section 8, article 1, of the Constitution.

In the act of June 11, 1906, Congress does not undertake to prescribe a rule or regulation for the conduct or government of the business of the common carrier for the infraction of which a penalty or liability is imposed, but the act only declares that the carrier shall be liable for all damages to its employees, the result of the negligence of its officers, agents, employees, etc.

38 In other words, the act abolishes the common-law rule as to fellow-servants, as heretofore applied in the United States courts.

There is no express grant of power to Congress over the subject of the liability of common carriers or other employers to their employees for torts, nor, in my opinion, is there any express grant from which such power can be necessarily or even reasonably implied.

The power to prescribe rules for the government of interstate commerce necessarily carries with it the power and right to declare liability for their infraction. Otherwise, a statute prescribing a rule would be a dead letter. A government with power to enact laws, but without power to enforce obedience of them would be a howling farce in these strenuous practical times.

Had the act prescribed some rule, or rules, for the safer and more expeditious transaction of the business of common carriers, and which they were to observe, and fixed the liability, as it is in the act, for their failure to observe the rules and regulations, we would have a different act, and one very similar to the safety-appliance act.

My conclusion on this branch of the case is that the power of Congress to define the liability of common carriers engaged in interstate commerce to their employees, and to create rights of action in favor of employees and to define the method of procedure can only be exercised when Congress in the first instance has prescribed rules of conduct governing common carriers, and it is only for the breach of these rules that Congress has the power to prescribe civil liability. Independent of such rules, Congress has no power to define the liability of a common carrier to its servants on account of torts committed by other servants of the common carrier. (Sherlock v. Alling, 93 U. S., 99.)

The second ground of demurrer in substance is, that if the act regulates commerce at all, it regulates intrastate as well as interstate commerce.

39 The act provides that every common carrier engaged in trade or commerce between the several States shall be liable to any of its employees, etc.

The character of commerce—that is, whether it is intra or inter state—is to be determined by the point of reception and the point of destination, and not by the number or length of railroads over which it is routed. All common carriers who haul or forward interstate commerce over any portion of its route are engaged in interstate commerce, if the several roads have existing a joint schedule or traffic rates for the purpose of handling through passengers and freight.

Now, manifestly, the line of one of the carriers may lie wholly within a single State, yet it is engaged in interstate commerce if it maintains a joint traffic schedule of rates and receives from an interstate road freight that comes from another State and forwards it to its point of destination or delivers it to a connecting line.

And under the act of Congress its liability to all of its employees for all damages is the same as is the common carrier whose lines extend across the continent, when, in point of fact, this intrastate road may handle only one car or one train of interstate freight in a month, while, under the act, it is liable for all damages to all employees all the time, even though at the time of the injury it is doing strictly an intrastate business.

This infirmity in this act is so plainly observable that I deem it unnecessary to further discuss it. Certain it is that the States have not delegated to Congress the power to regulate commerce wholly within a single State; and if Congress has the power to enact the law in question limited to interstate common carriers, it has, in this act, exceeded that power by including within its terms intrastate commerce.

It was indirectly suggested in the argument that, if the court should take this view of the case, and hold that as the act reads it applies to intra as well as inter state commerce, it was not the intention of Congress that the act should extend to and embrace intrastate common carriers, and that this objection might be remedied by judicial interpretation and construction.

The act is plain on its face. It applies to all common carriers engaged in trade or commerce between the States, and imposes upon common carriers whose lines lie wholly within a State, if such lines do any interstate business, the same liability as a common carrier who handles only interstate business.

Three days before this case was heard the Supreme Court of the United States, in the case of I. C. R. R. Co. vs. McKendree, decided a very similar question to the one raised here against the contention of the plaintiff.

In that case the Supreme Court was, among other things, asked to pass upon the validity of an order (No. 107) of the Hon. Secretary of Agriculture, made pursuant to an act of Congress of February 2, 1903, the effect of which order was to ratify and adopt for the United States a quarantine line formerly adopted by the State of Tennessee, running from east to west through the State of Tennessee, the same not following the State lines between the States of Tennessee and Kentucky, or any other States. This order pro-

hibited the carrying of cattle from south of the line to the north of it, and, in effect, prohibited the carrying of cattle from any county in Tennessee south of the line to a county in Tennessee north of it.

The contention of the defendant was that the statute was unconstitutional, and therefore the order was a nullity, because it embraced in its terms intrastate as well as interstate commerce.

It was insisted by the Government that it was not the intention of the Secretary to make provision for intrastate commerce, as the recital of the order shows an intention to adopt the State lines. In disposing of this contention, the Supreme Court says:

"The terms of order 107 apply to all cattle transported
41 from the south of this line to parts of the United States north thereof. It would, therefore, include cattle transported within the State of Tennessee from the south of the line, as well as those from outside that State. There is no exception to the order, and in terms it includes all cattle transported from the south of the line, whether within or without the State of Tennessee. It is urged by the Government that it was not the intention of the Secretary to make provisions for intrastate commerce, as the recital of the order shows an intention to adopt the State line when the State by its legislature has passed the necessary laws to enforce the same completely and strictly. But the order in terms applies alike to interstate and intrastate commerce. A party prosecuted for violating this order would be within its term if the cattle were brought from the south of the line to a point north of the line within the State of Tennessee. It is true the Secretary recites that legislation has been passed by the State of Tennessee to enforce the quarantine line, but he does not limit the order to interstate commerce coming from south of the line, and, as we have said, the order in terms covers it. We do not say that the State line might not be adopted in a proper case, in the exercise of Federal authority, if limited in its effect to interstate commerce coming from below the line, but that is not the present order, and we must deal with it as we find it.

"Nor have we the power to so limit the Secretary's order to have it apply to interstate commerce, which, it is urged, is all that is here involved. For ought that appears upon the face of the order, the Secretary intends it to apply to all commerce, and whether he would have made such an order if strictly limited to interstate commerce we have no means of knowing.

"The order is in terms single and indivisible."

42 Citing: U. S. vs. Reese, 92 U. S., 214–21.

Trade-Mark Cases, 100 U. S., 82–89.

U. S. vs. Ju Foy, 198, U. S., 253, 262, 263.

These principles apply to the act under consideration, and by it Congress undertook to make a sweeping and far-reaching change in the law of torts as heretofore administered by the United States court, touching the liability of common carriers to their employees. The act is single in character, and includes commerce, if it be com-

merce, wholly within the State, thereby exceeding the authority delegated to Congress by the Constitution of the United States.

My conclusion is that Congress is not authorized, under the commerce clause of the Constitution of the United States, to enact this legislation, for the reason that the relation of interstate common carriers, engaged in interstate trade or commerce, to their employees, and their liability to them in damages for injuries sustained in their employment, as the result of the negligence of any of their officers, agents, or employees, or by reason of any defects or insufficiency due to their negligence in their cars, engines, appliances, machinery, track, roadbed, ways, or works, is not commerce within the meaning of the Constitution. But if it were, the act does not undertake to regulate this relation of liability, but simply announces by an act of Congress a new law on torts limited to a special class of those engaged in interstate commerce.

The act does not limit the liability which it seeks to impose upon common carriers engaged in interstate trade and commerce to such common carriers, but imposes the same liability upon common carriers engaged in trade and commerce wholly within the State.

Without discussing the two remaining grounds of demurrer I am of the opinion that the demurrer is good and must be sustained.

An order will be entered in conformity with this opinion.

McCALL, J.

January 1st, 1907.

43 United States of America, Western Division of the Western District of Tennessee.

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at the regular term thereof, begun and held for its November term A. D. 1906, at the United States court-house in the city of Memphis, in said district, on, to wit, the 1st day of January, A. D. 1907, in the following cause, to wit:

DAMSELLE HOWARD, ADMINISTRATRIX OF THE ESTATE OF Will Howard, deceased, *vs.* ILLINOIS CENTRAL RAILROAD COMPANY AND YAZOO & MISSISSIPPI VALLEY Railroad Company.	No. 3861.

Came the parties, by their attorneys, and argued the demurrer of the defendants to the amended declaration of plaintiff, and upon consideration whereof the court is of the opinion that the act of Congress approved June 11, 1906, and entitled "An act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employes," is

unconstitutional and void, and that the demurrer should be sustained. It is, therefore, ordered that defendants' demurrer be and is hereby sustained, and the plaintiff's suit be and is hereby dismissed at plaintiff's cost, for which let execution issue. To the action of the court in holding the act of Congress approved June 11, 1906, unconstitutional and void and sustaining the demurrer of the defendants and in dismissing plaintiff's suit the plaintiff excepts

44 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee, at Memphis.

DAMSELLE HOWARD, AS ADMINISTRATRIX OF THE estate of Will Howard, deceased, plaintiff,
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY AND the Yazoo & Mississippi Valley Railroad Company, defendant.
} No. 3861. Law.

Petition for writ of error.

Filed January 19th, 1907. Dan F. Elliotte, clerk.

The above-named Damselle Howard, as administratrix of Will Howard, deceased, the plaintiff in the above-styled suit, hereby applies and prays for a writ of error from the judgment entered against her in the above suit at the present term on the first day of January, 1907, sustaining the demurrer to her declaration in the said suit, and dismissing the said suit, and adjudging the costs thereof against her, and awarding execution for such costs, all as appears in the said judgment in court here, to the Supreme Court of the United States for the reasons specified in her assignment of errors, which is filed with and as a part of this petition.

And she prays that the said writ of error may be allowed, and that a transcript of the record, proceedings, and papers upon which the said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States, as required by law.

BELL, TERRY, ANDERSON & BELL,
Attorneys for Plaintiff, Damselle Howard, as Administratrix.

45 The foregoing petition and claim for a writ of error to the Supreme Court of the United States is allowed this 19th day of January, 1907, from the judgment therein referred to, returnable within thirty (30) days, upon the bond for the writ of error in the sum of five hundred ($500.00) dollars, which has been executed, and which has been approved by me as judge, and is filed along with this order.

JOHN E. MCCALL,
U. S. District Judge.

46 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee, at Memphis.

DAMSELLE HOWARD, AS ADMINISTRATRIX OF THE ESTATE of Will Howard, deceased, plaintiff, *vs.* THE ILLINOIS CENTRAL RAILROAD COMPANY AND The Yazoo & Mississippi Valley Railroad Company, defendants.	No. 3861. Law.

Assignment of errors.

Filed January 19th, 1907, Dan F. Elliotte, clerk.

The plaintiff in the above-styled suit, Damselle Howard, as administratrix of Will Howard, deceased, comes and says that in the judgment of this court, at its present term on the 1st day of January, 1907, sustaining the demurrer of the defendants to her declaration in this suit, and dismissing the said suit and adjudging the costs thereof against her and awarding an execution for such costs, and in the record and proceedings in this cause, there is manifest error in this:

That the court was of opinion and held and adjudged that the act of Congress approved June 11th, 1906, entitled "An act relating to liability of common carriers in the District of Columbia and Territories, and common carriers engaged in commerce between the States and between the States and foreign nations, to their employees," is unconstitutional and void, so far as it is applicable to her cause of action, and so far as it undertakes to confer upon her a right of action, for the causes stated in her declaration, and on that ground sustaining the said demurrer and dismissing her said suit, all as more fully appears by the judgment of record in this suit, which is here referred to as part of this assignment.

Wherefore, etc.

BELL, TERRY, ANDERSON & BELL,
Attorneys for Damselle Howard, as Admx., Plaintiff.

47 United States of America, Western Division of the Western District of Tennessee.

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1906, at the United States court-house in the city of Memphis, in said district, on, to wit, the 19th day of January, A. D. 1907, in the following cause, to wit:

DAMSELLE HOWARD, AS ADMINISTRATRIX OF THE Estate of Will Howard, deceased, *vs.* THE ILLINOIS CENTRAL RAILROAD COMPANY, AND the Yazoo & Mississippi Valley Railroad Company, defendants.	No. 3861. Law.

Comes the said Damselle Howard, as administratrix, and files her assignment of errors to the judgment pronounced against her in the above-styled suit at the present term on the first day of January, 1907, sustaining the demurrer of the defendants to her declaration, and dismissing her suit and awarding a judgment against her for costs thereof, and execution for such costs, as in the judgment of record more fully appears, and has filed a petition for a writ of error from the said judgment to the Supreme Court of the United States, which is granted, returnable within thirty (30) days from the filing of her writ of error bond, which writ of error bond, conditioned as required by law, in the penal sum of five hundred ($500.00) dollars, with good sureties, approved by the Honorable John E. McCall, one of the judges of this court, is now accordingly filed. And thereupon the defendants, The Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, by their attorneys and solicitors, Charles N. Burch and Albert W. Biggs, in open
48 court acknowledge service of the citation in error, and notice of the said writ of error, and agree to appear and defend the same in the Supreme Court of the United States at the time and place designated.

49 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

DAMSELLE HOWARD, ADMINISTRATRIX, *vs.* THE ILLINOIS CENTRAL RAILROAD COMPANY and The Yazoo & Mississippi Valley Railroad Company.	No. 3861. Law.

Bond for writ of error.

Filed January 14th, 1907. Dan F. Elliotte, clerk.

Know all men by these presents, that we, Damselle Howard, administratrix of the estate of Will Howard, deceased, as principal, and Lindsay B. Phillips, as surety, are held and firmly bound unto the defendants in error, The Illinois Central Railroad Company and The

Yazoo & Mississippi Valley Railroad Company, in the full and just sum of five hundred ($500.00) dollars, to be paid to the said defendants in error, The Illinois Central Railroad Company and The Yazoo & Mississippi Valley Railroad Company, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of January, in the year of our Lord one thousand nine hundred and seven.

Whereas lately at the Circuit Court of the United States for the Western Division of the Western District of Tennessee, in a suit pending in said court between Damselle Howard, administratrix of the estate of Will Howard, deceased, plaintiff, and The Illinois Central Railroad Company and The Yazoo & Mississippi Valley Railroad Company, defendants in error, a judgment was rendered against the said Damselle Howard, administratrix of the estate of Will Howard, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid
50 suit, and a citation directed to the said defendants in error, The Illinois Central Railroad Company and The Yazoo & Mississippi Valley Railroad Company, citing and admonishing them to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the 11th day of February next.

Now, the conditions of the above obligation are such that if the said Damselle Howard, administratrix of Will Howard, deceased, shall prosecute said writ of error, and answer all damages and costs if she fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

DAMSELLE HOWARD,
Admrx. of Estate of Will Howard, Deceased,
by John E. Bell, Her Attorney. [SEAL.]
LINDSAY B. PHILLIPS. [SEAL.]
JOHN E. BELL. [SEAL.]

Sealed and delivered in presence of
DAN F. ELLIOTTE.

Approved by:

JNO. E. MCCALL,
U. S. District Judge.

51 *Writ of error.*

The President of the United States of America to the honorable the judges of the Circuit Court of the United States for the Western District of Tennessee, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of the

United States for the Western Division of the District of West Tennessee, before you, or some of you, between Damselle Howard, as administratrix of Will Howard, deceased, on the one side, and the Illinois Central Railroad Company and the Yazoo and Mississippi Valley Railroad Company on the other, wherein was drawn in question the constitutionality and validity of a statute of the United States, and the decision was against its constitutionality and validity, manifest error has intervened, to the great damage of the said plaintiff Damselle Howard, as administratrix, as by her complaint appears—we being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf—do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within thirty (30) days next ensuing in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 19th day of January, in the year of our Lord one thousand nine hundred and seven.

DAN F. ELLIOTTE,
Clerk of the Circuit Court of U. S.
for the District of West Tennessee.

Allowed by JNO. E. M. CALL,
Judge of the U. S. District Court
for the District of West Tennessee.

52 *Acknowledgement of service.*

The defendants in error in the within writ of error hereby acknowledges due and legal service of the same and that a copy thereof has been filed in the clerk's office of the Circuit Court of the United States at Memphis, Tennessee, in said suit.

This the 25th day of January, A. D. 1907.

ILLINOIS CENTRAL RAILROAD COMPANY
and YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY,
By CHAS. U. BURCH, *Attorney.*

53 *Citation.*

United States of America, to the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden in the city of Wash-

ington, within thirty (30) days next after this date, pursuant to a writ of error filed in the office of the clerk of the Circuit Court of the United States for the Western Division of the Western District of Tennessee, at Memphis, wherein Damselle Howard, as administratrix of Will Howard, deceased, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand, this 19th day of January, 1907.

JNO. E. MCCALL,
District Judge of the U. S. for the District of West Tennessee.

On behalf of the defendants in error named above, the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, we acknowledge due and legal service of the above citation, and agree to appear in the Supreme Court of the United States at the time designated, to answer the same.

Done this 22 day of January, 1907.

CHARLES N. BURCH,
ALBERT W. BIGGS,
Attys. for the I. C. R. R. Co. and the Y. & M. V. R. R. Co.

54 The United States of America, Sixth Judicial Circuit, Western District of Tennessee.

I, Dan F. Elliotte, clerk of the Circuit Court of the United States for the Western Division of said Western District of Tennessee, do hereby certify that the papers hereto attached, are full, true, perfect, and correct copies of the originals and of the entire record and proceedings (including the original writ of error and citation) in said court as the same now appears of record and upon the files in my office, in the following cause, to wit:

DAMSELLE HOWARD, ADMX. OF THE ESTATE Will Howard, deceased, *vs.* THE ILLINOIS CENTRAL R. R. CO. AND THE Yazoo and Mississippi Valley R. R. Company.	No. 3861.

In testimony whereof I have hereunto written my name and affixed the seal of said court, at my office in the city of Memphis, Tennessee, this 18 day of January, A. D. 1907, and of the independence of the United States the 131st year.

[SEAL.] DAN F. ELLIOTTE, *Clerk.*

23550—07 M——3

Authentication.

I, Jno. E. McCall, a judge of said court, do hereby certify that Dan F. Elliotte, whose genuine signature appears to the foregoing certificate is, and was at the date of the same, clerk of said court, and that his attestation is in due form.

JNO. E. MCCALL,
Judge of the District Courts of the United States for the district aforesaid.

55 (Indorsement on cover:) File No. 20552, W. Tennessee, C. C. U. S. Term No. 587. Damselle Howard, as administratrix of Will Howard, deceased, plaintiff in error, *vs.* The Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company. Filed January 29th, 1907. File No., 20552.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

DAMSELLE HOWARD, ADMINISTRATRIX, plaintiff in error,
v.
THE ILLINOIS CENTRAL RAILROAD Company et al.
No. 587.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

MOTION TO ADVANCE.

Comes now the plaintiff in error and moves the court to advance this case and set it down for hearing on some day during the present term.

The case involves the constitutionality of what is known as the "employers' liability act," passed by Congress at its last session and approved June 11, 1906 (34 Stat. 232, c. 3073), entitled "An act relating to liability of common carriers in the District of Columbia and Territories, and common carriers engaged in commerce between the States and between the States and foreign nations to their employees."

22410—07

The court below held unconstitutional section 1 of the act which makes a common carrier engaged in interstate commerce "liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent on him, for all damages which may result from the negligence of any of its officers, agents, and employees"—in other words, which abolishes the fellow-servant rule in respect such carriers.

The act is of the greatest public importance—so much so that the Acting Attorney-General deemed it his duty to obtain leave to be heard in the court below upon its constitutionality, and we are advised that a like application will be made by the present Attorney-General to this court. There are a number of similar cases now pending in the State and Federal courts, and many more are likely to arise in the future, so that an early decision as to the constitutionality of the statute is most desirable. Besides, both existing and prospective legislation with respect to common carriers engaged in interstate commerce may be affected by the decision as to the principles involved.

We are authorized to say that opposing counsel unite in this motion.

Respectfully submitted,

BELL, TERRY, ANDERSON & BELL,
Attorneys for Plaintiff in Error.

WILLIAM R. HARR,
Of Counsel.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

DAMSELLE HOWARD, ADMINISTRATRIX, plaintiff in error,
v.
THE ILLINOIS CENTRAL RAILROAD COMPANY et al.
} No. 587.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

APPLICATION OF THE ATTORNEY-GENERAL FOR LEAVE TO BE HEARD AS AMICUS CURIÆ.

This case involves the constitutionality of the act of Congress of June 11, 1906, c. 3073 (34 Stat., 232), commonly known as the "employers' liability act," so far as it relates to common carriers engaged in interstate commerce, that act abolishing, with respect to such carriers, as well as common carriers in the District of Columbia and the Territories and those engaged in foreign commerce, the common-law rule as to the nonliability of the employer for injuries to his employee occasioned by the negligence of fellow-servants.

22411—07

Because of its great public importance and the bearing which the decision of the case may have upon other legislation respecting common carriers engaged in interstate commerce, in which both the Government and the people of the United States are vitally interested, I beg leave to be heard as amicus curiæ, by brief and argument, upon the question of the constitutionality of the statute.

Both parties consented to the intervention of the Government in this way in the court below, and ~~it is understood that there will be no objection by either~~ to its doing so in this court.

It is highly desirable that the questions arising in this cause should be finally determined before the meeting of Congress in December next, so that, if anything in the form or language of the statute shall be found by this court to affect its validity, an opportunity may be afforded to promptly remedy these defects by appropriate legislation. It is hoped, therefore, that the motion to advance, which will be submitted herein, may be granted.

Respectfully submitted,

CHARLES J. BONAPARTE,
Attorney-General.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

DAMSELLE HOWARD, ADMINISTRATRIX OF the estate of Will Howard, plaintiff in error,
v.
THE ILLINOIS CENTRAL RAILROAD COMPANY and the Yazoo and Mississippi Valley Railroad Company.
} No. 587.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

BRIEF OF THE ATTORNEY-GENERAL AS AMICUS CURIÆ UPON THE CONSTITUTIONALITY OF THE EMPLOYERS' LIABILITY ACT.

STATEMENT OF CASE.

This suit was originally instituted in the Circuit Court of Shelby County, Tenn., but upon petition of the defendants was removed to the Circuit Court of the United States for the Western District of Tennessee.

The declaration as amended and finally filed (R., 16) alleged that the plaintiff was the duly appointed and qualified administratrix of the estate of Will Howard, deceased, and that "the defendants are

railroad corporations engaged in interstate trade and commerce between the several States of the Union, and especially between the States of Tennessee and Mississippi." It averred that theretofore "the said Will Howard, deceased, plaintiff's intestate, was in the employ of the defendants as a fireman upon one of their interstate passenger trains, to wit, passenger trains running between the city of Memphis, in the State of Tennessee, and various points in the State of Mississippi; and on or about the 27th day of June, 1906, while the said Will Howard was engaged in the performance of his duties as fireman for the defendants, the defendants so negligently conducted themselves and so negligently managed the operation of their said train that their said train was caused to collide with another engine and train of cars in Shelby County, Tenn., which said collision, negligently produced as aforesaid, inflicted upon plaintiff severe and fatal injuries, from the result of which he lingered and died."

It further alleged that "the negligence of the defendants consisted in the operation of their said train by a fellow servant of deceased, to wit, the engineer on said interstate train, so as to produce a collision, without fault upon the part of the deceased, Will Howard, and while the said Will Howard was in the exercise of due care and diligence."

The cause of action was expressly predicated upon the act of Congress of June 11, 1906, known as the employers' liability act.

It was alleged that decedent left surviving him a widow, the plaintiff, and an infant child. Damages were claimed in the sum of $20,000.

The defendants, after first pleading to the declaration (R., 9), withdrew their pleas and filed a demurrer (R., 11), which, as finally modified (R., 15), raised simply the constitutionality of the act of Congress of June 11, 1906.

After argument, the court held that the act of Congress referred to was unconstitutional and void, and gave judgment sustaining the demurrer and dismissing the suit (R., 17, 25). To review such judgment the plaintiff sued out a writ of error from this court.

THE STATUTE.

(34 Stat., 232.)

CHAPTER 3073. An act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

SEC. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

SEC. 3. That no contract of employment, insurance, relief, benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief, benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: *Provided, however,* That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief, benefit, or indemnity that may have been paid to the injured employee, or in case of his death to his personal representative.

SEC. 4. That no action shall be maintained under this act unless commenced within one year from the time the cause of action accrued.

SEC. 5. That nothing in this act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees

under the safety-appliance act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three.

Approved, June 11, 1906.

ARGUMENT.

I.

History and Purpose of the Act.

The act in question, like the safety-appliance act, is the result of an effort to lessen the dangers of railroad transportation to both passengers and employees. It was a natural and logical step from the safety-appliance act, which required railroads engaged in interstate commerce to equip their cars with certain described appliances and abolished the doctrine of assumption of risk on the part of employees in the case of their failure to do so, to the present statute, which makes them liable for injuries to employees occasioned by the negligence of their officers, agents, and employees, or by reason of any defect or insufficiency due to their negligence in their cars, engines, appliances, machinery, track, roadbed, ways, or works.

The bill, as introduced into and passed by the House, related only to railroads. It was amended, however, in the Senate Committee on Interstate Commerce, at the suggestion of representatives of the railroads, so as to apply to all common carriers under the control of Congress. In favorably reporting the bill the House committee said:

> A Federal statute of this character will supplant the numerous State statutes on the subject so far as they relate to interstate

commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all the States.

It is thought that the adoption of the rule, as provided in this section [sec. 1], *will be conducive to greater care in the operation of railroads.* As it is now, where the doctrine of fellow-servant is in force, no one is responsible for the injury or death of a fellow-servant. The coservant who is guilty of negligence resulting in the injury may be liable, but as a rule he is not responsible, and hence the injury is not compensated. The employee is not held by the employer to such strict rules of caution for the safety of his coemployee, because the employer is not bound to pay the damages in case of injury. If he were held liable for damages for every injury occasioned by the negligence of his servant, *he would impose the same strict rules for the safety of his employees as he does for the safety of passengers and strangers.* He will make the employment of his servant and his retention in the service dependent upon the exercise of higher care, and this will be the stronger inducement to the employee to act with a higher regard for the safety of his fellow-workmen.

A copy of the report referred to is appended.

The act in question bears on its face evidence of the relation which Congress understood it had to the safety-appliance legislation. Section 5 provides:

SEC. 5. That nothing in this act shall be held to limit the duty of common carriers by

> railroads or impair the rights of their employees under the safety-appliance act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three.

By an act approved March 3, 1901 (31 Stat., 1446), it was provided that:

> It shall be the duty of the general manager, superintendent, or other proper officer of every common carrier engaged in interstate commerce by railroad to make to the Interstate Commerce Commission, at its office in Washington, District of Columbia, a monthly report, under oath, of all collisions of trains or where any train or part of a train accidentally leaves the track, *and all accidents which may occur to its passengers or employees* while in the service of such common carrier and actively on duty, which report shall state the nature and causes thereof and the circumstances connected therewith.

Failure to make such report by any common carrier was made a misdemeanor, punishable by fine.

By joint resolution approved June 30, 1906 (34 Stat., 838), Congress directed and empowered the Interstate Commerce Commission to investigate and report on the use and necessity for block-signal systems and appliances for the control of railway trains in the United States, and in transmitting its report the Commission was directed to "recommend such legislation as to the Commission seems advisable."

At the last session Congress passed an act, approved

March 4, 1907, limiting the hours of service of employees of common carriers engaged in interstate or foreign trade or commerce and in the District of Columbia and the Territories. This act is entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon."

That all this legislation is part and parcel of a general scheme by Congress to lessen the dangers of railroad transportation to those engaged in or connected therewith is manifest. If this statute is unconstitutional, it is difficult to see how, on principle, the other measures referred to can be sustained.

The President, in his annual message to Congress of December 6, 1904, said (39 Cong. Rec., 11):

> The ever-increasing casualty list upon our railroads is a matter of grave public concern, and urgently calls for action by the Congress. In the matter of speed and comfort of railway travel our railroads give at least as good service as those of any other nation, and there is no reason why this service should not also be as safe as human ingenuity can make it. Many of our leading roads have been foremost in the adoption of the most approved safeguards for the protection of travelers and employees, yet the list of clearly avoidable accidents continues unduly large. The passage of a law requiring the adoption of a block system has been proposed to Congress. I earnestly concur in that recommendation, and would also point out to the Congress the urgent need of legislation in the interest of the public safety limiting the

hours of labor for railroad employees in train service upon railroads engaged in interstate commerce, and providing that only trained and experienced persons be employed in positions of responsibility connected with the operation of trains. Of course nothing can ever prevent accidents caused by human weakness or misconduct; and there should be drastic punishment for any railroad employee, whether officer or man, who by issuance of wrong orders or by disobedience of orders causes disaster. The law of 1901, requiring interstate railroads to make monthly reports of all accidents to passengers and employees on duty, should also be amended so as to empower the Government to make a personal investigation, through proper officers, of all accidents involving loss of life which seem to require investigation, with a requirement that the results of such investigation be made public.

The safety-appliance law, as amended by the act of March 2, 1903, has proved beneficial to railway employees, and in order that its provisions may be properly carried out, the force of inspectors provided for by appropriation should be largely increased. This service is analogous to the Steamboat-Inspection Service, and deals with even more important interests. It has passed the experimental stage and demonstrated its utility, and should receive generous recognition by the Congress.

In the same message he said:

The wageworkers are peculiarly entitled to the protection and the encouragement of the law. From the very nature of their occupa-

> tion railroad men, for instance, are liable to be maimed in doing the legitimate work of their profession, unless the railroad companies are required by law to make ample provision for their safety. The Administration has been zealous in enforcing the existing law for this purpose. That law should be amended and strengthened. Wherever the National Government has power there should be a stringent employer's liability law, which should apply to the Government itself where the Government is an employer of labor.
>
> In my message to the Fifty-seventh Congress, at its second session, I urged the passage of an employer's liability law for the District of Columbia. I now renew that recommendation, and further recommend that the Congress appoint a commission to make a comprehensive study of employer's liability with the view of extending the provisions of a great and constitutional law to all employments within the scope of Federal power.

Like recommendations were made by the President in his message of December 5, 1905 (40 Cong. Rec., 93–94).

In *Johnson* v. *Southern Pacific Company* (196 U. S., 1), this court, in considering the safety-appliance act, said (p. 17):

> The *primary* object of the act was to promote the public welfare by securing the safety of employees and travelers.

The court also said (p. 16):

> The object was to protect the lives and limbs of railroad employees by rendering it

> unnecessary for a man operating the coupler to go between the ends of the cars, and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other.

The court here recognizes that the public welfare, as involved in interstate commerce, may be promoted by legislation for the protection of persons employed in carrying it on.

The essential purpose of a remedial statue like this is to be detemined from the conditions which engendered it. The attention of Congress had been called again and again, both by messages from the President and by the occurrence of accidents, of which there has lately been such an appalling recurrence, to the dangers of railroading. When in the light of these conditions Congress extended the liability of common carriers for injuries occasioned by their negligence to that great mass of their employees occupying in the eye of the law the position of fellow-servants, its primary purpose evidently was, not simply to compensate such employees or their families for their injury or death, but to lessen as far as possible such injuries and enhance the safety of railroad transportation to all concerned.

The safety of the traveling public depends not only upon proper cars and appliances but upon the safety of the persons operating those appliances. The injury or death of a brakeman, a switchman, an engineer, or fireman means often the injury or

destruction of the train, its passengers, and freight. Every measure, therefore, which tends to increase the safety of the employees of common carriers tends likewise to increase the safety of passengers and property transported.

II.

Provision of Statute Involved.

The only provision of the act of June 11, 1906, involved in this case is that of section 1, making common carriers engaged in interstate commerce liable for injuries to their employees resulting from the negligence of any of their officers, agents, or employees—in other words, which abolishes the fellow-servant rule.

The provision of section 2, modifying the rule as to the effect of contributory negligence, is not involved, it being admitted on the pleadings that the injured employee was in the exercise of due care and diligence, and no contract of employment, insurance, relief, etc., such as is referred to in section 3, was set up.

III.

Nature and Evolution of Fellow-Servant Rule.

The common-law rule which forbids recovery against an employer for injuries sustained by an employee through the negligence of a fellow-servant has been rested by the courts upon the supposed requirements of public policy. Public policy, it was thought, forbade a recovery in such instances,

because it would tend to engender laxity and carelessness in employees, just as public policy was held to forbid a common carrier from limiting its liability for injuries to persons or property transported.

McKinney, in his work on Fellow Servants, says (sec. 10):

> Like the rule of *respondeat superior* the fellow-servant rule is founded upon *public policy* and had its origin in the idea that the employee has the means of knowing just as well as the employer all the ordinary risks incident to the service in which he is about to engage; and that these, including the perils that might arise from the negligence of other servants in the same business, entered into the contemplation of the parties in making the contract, on account of which the law implies the servant has insisted upon a rate of compensation which would indemnify him for the hazards of the employment. And again, the law supposes that the relation which the several employees sustain to each other and the business in which they are engaged would enable them better to guard against such risks and accidents than could the employer. *Besides, the moral effect of devolving these risks upon the employees themselves would be to induce a greater degree of caution, prudence, and fidelity than would in all probability be otherwise exercised by them.*

The first reported case in which the rule was applied was *Priestley* v. *Fowler* (3 M. & W., 1), decided in 1837 by the Court of Exchequer. That was an action

by the servant of a butcher to recover damages for injuries sustained by him through the overloading by another servant of a van owned by the defendant, the van being used in carrying goods for hire and the plaintiff having been directed by the defendant to accompany certain of his goods therein.

In holding that the defendant was not liable the court, speaking by Lord Abinger, proceeded upon the theory that no distinction was to be made between a common carrier and any other employer, and that to hold the master liable in that case would make him liable for the negligence of all his household servants to their fellows. The decision was finally rested, however, upon grounds of public policy, the court saying:

> In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford.

The rule thus announced appears to have been first applied to railroads in England in *Hutchinson* v. *York, &c., Ry. Co.*, 1850 (5 Excheq., 341), the court holding that the injured employee must, under the

authority of the Priestly case, be held to have assumed the risk of negligence on the part of fellow-servants.

In the first American case in which the rule was applied to a railroad and its employees (*McMurray* v. *South Carolina Railroad Company*, 1838, 1 McMullan, *385) three of the judges dissented, and in the first Pennsylvania case the doctrine was adopted only by a vote of three to two. (*Ryan* v. *Cumberland Valley R. R. Co.*, 1854, 23 Pa. St., 384.)

The leading American case on this subject is *Farwell* v. *Boston and Worcester Railroad Corporation*, 1842 (4 Met., 49). In that case the court, speaking by Chief Justice Shaw, rested its judgment upon the consideration of justice and public policy. The court said (pp. 57–59):

> The general rule, *resulting from considerations as well of justice as of policy*, is that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is likely to know and against which he can as effectually guard as the master. They are perils incident to the service and which can be as distinctly foreseen and

> provided for in the rate of compensation as any others.
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> * * * * *
>
> If we look from considerations of justice to those of *policy* they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned under given circumstances.

In *Schlemmer* v. *Buffalo, Rochester and Pittsburg Ry. Co.*, recently decided, referring to section 8 of the safety-appliance act of March 3, 1893, which provides that any employee injured by any car in use contrary to the provisions of the act shall not be deemed to have assumed the risk thereby occasioned, this court, speaking by Mr. Justice Holmes, said:

> An early, if not the earliest, application of the phrase "assumption of risk" was the establishment of the exception to the liability of a master for the negligence of his servant when the person injured was a fellow-servant of the negligent man. Whether an actual assumption by contract was supposed on grounds of economic theory or the assumption was imputed because of a conception of justice and convenience does not matter for the present

purpose. Both reasons are suggested in the well-known case of *Farwell* v. *Boston and Worcester R. R. Co.* (4 Met., 49, 57, 58). But at the present time the notion is not confined to risks of such negligence. It is extended, as in this statute it plainly is extended, to dangerous conditions, as of machinery, premises, and the like, which the injured party understood and appreciated when he submitted his person to them. In this class of cases the risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, on a general principle of our law. Probably the modification of this general principle by some judicial decisions and by statutes like section 8 is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist.

Cooley, in his work on Torts (pp. 542, 545) also rests the rule on grounds of public policy.

The Parliament of England and many of the State legislatures of this country have not acquiesced in the views as to the requirements of public policy entertained by the courts that have created and extended the fellow-servant doctrine, so far, at least, as the more hazardous employments, and particularly railroading, are concerned. It also appears that other European countries, including France, Germany and Austria, are in accord with the more enlightened views on this subject.

The statutes of England and of States on this subject are set out and discussed in Labatt on Master and Servant (1904), volume 2, Chapters XXXVI–XL. Referring to the history of the English act, the author says:

> The dissatisfaction, which the doctrine of common employment, as applied in the earlier English decisions, has naturally provoked among those classes of the community who suffered most severely from its operations, was at last brought to a head by the famous case of *Wilson* v. *Merry*. After several years of vigorous agitation, both in and out of Parliament, a select committee of the House of Commons which made a careful investigation of the subject, declared in favor of a modification of the law. One of the recommendations was embodied in the following passage of the report, submitted in 1877: "Your committee are of opinion that in cases such as these—that is, where the actual employers can not personally discharge the duties of masters, or where they deliberately abdicate their functions and delegate them to agents—the acts or defaults of the agents who thus discharge the duties and fulfill the functions of masters should be considered as the personal acts or defaults of the principals and employers and should impose the same liability on such principals and employers as they would have been subject to had they been acting personally in the conduct of the business, notwithstanding that such agents are technically in the employment of the principals." It was also suggested that

> the doctrine of common employment should be narrowed so as to be applicable only to those cases where each servant "is an observer of the conduct of the other, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precaution and employ such agents as the safety of the whole party may require." Proposals of a much more radical nature were put forward in the draft report submitted by Mr. Lowe.
>
> A bill framed on the lines thus suggested was introduced into Parliament in 1879, but withdrawn at the close of the session. It was reintroduced in 1880, and after a reference to a select committee and a good deal of discussion, which bore fruit in various amendments, was finally passed.

The English act, which came into operation in 1881, applied in some of its provisions to all employments and gave a workman a right to recover for personal injury sustained by reason of "any defect in the condition of ways, works, machinery, or plant connected with or used in the business of his employer," due to his negligence, by reason of the negligence of another employee exercising control and direction over him, and by reason of the act or omission of any employee done in the pursuance of the by-laws or particular instructions of the employer.

That act also gave a remedy where personal injury to an employee was caused:

> SEC. 5. By reason of the negligence of any person in the service of the employer who has

> charge or control of any signal points, locomotive engine, or tram upon a railway, the workman, or in case the injury results in death, the legal representative of the workman, and any person entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman or in the service of the employer, nor engaged in his work.

The amount that could be recovered under this act was limited to the estimated earnings of a person in like grade of employment during the three years preceding the injury.

Subsequently, in 1897 and 1900, Parliament enacted statutes making certain employers in the more hazardous lines of labor, including railways, in effect insurers of the workmen to a limited amount. (See Labatt on Master and Servant, vol. 2, Chap. XL.)

Georgia was the first American State to legislate on this subject, enacting in 1855 the following provision:

> Railroads are common carriers, and liable as such. *As such companies have many employees who can not possibly control those who should exercise care and diligence in the running of trains,* such companies shall be liable to such employees as to passengers for injuries arising from the want of such care and diligence.

This provision has been reenacted from time to time. Iowa in 1862 enacted:

> Every railroad company shall be liable for all damages sustained by any person in con-

> sequence of any neglect of the agents, or by any mismanagement of the engineer or other employee of the corporation, to any person sustaining such damage.

Later legislation covers wrongs sustained by any person, including employees, through the negligence of a railroad corporation or its engineers or employees, when such wrongs are in any manner connected with the use or operation of the railway, and invalidates contracts limiting such liability.

In 1874 Kansas enacted the following statute:

> Every railroad company engaged in doing business in this State shall be liable for damages done to any employee of such company in consequence of any negligence of its agents or by any misunderstanding of its engineers or other employees, to any person sustaining such damage.

The English employers' liability act of 1880–1881 has been followed, more or less closely, by Alabama (1884), Massachusetts (1887), Colorado (1893), Indiana (1893), New York (1902). The statutes of these States do not limit the amount of recovery.

The following States have also materially modified or abolished the fellow-servant doctrine: Ohio (1890), Mississippi (1890), Texas (1891), Arkansas (1893), South Carolina (1895), North Carolina (1897), Utah, Wisconsin (1875, 1889).

Labatt, in the work cited, referring to the Colorado statute of 1901, which abolishes the fellow-

servant rule as to all employers and employments says (sec. 754):

> This simple straightforward enactment places the State of Colorado in the honorable position of being the first of the countries in which the common law prevails to abrogate a doctrine which, as the writer has endeavored to show in an earlier section (475), does not rest upon any satisfactory basis—logical, social, or economic—and which by relegating the injured person to his action against a coemployee who is, as a general rule, financially irresponsible, leaves him, in the great majority of instances, without any prospect whatever of obtaining an adequate indemnity.

In *Chicago and Milwaukee Railroad* v. *Ross* (112 U. S., 377), this court, speaking by Mr. Justice Field, said (pp. 382–338):

> The general liability of a railroad company for injuries caused by the negligence of its servants to passengers and others not in its service is conceded. It covers all injuries to which they do not contribute. But where injuries befall a servant in its employ a different principle applies. Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them, he can not recover compensation from his employer. The obvious reason for this exemption is that he has, or in law is supposed to have them, in contemplation when he engages in the service, and that his compensation is arranged accordingly. He can not, in

reason, complain if he suffers from a risk which he has voluntarily assumed and for the assumption of which he is paid. There is also another reason often assigned for this exemption—that of a supposed *public policy*. It is assumed that the exemption operates as a stimulant to diligence and caution on the part of the servant for his own safety as well as that of his master. Much potency is ascribed to this assumed fact by reference to those cases where diligence and caution on the part of servants constitute the chief protection against accidents. But it may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to dangers of life or limb because, if losing the one, or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant.

Shearman and Redfield, in their work on Negligence (5th edition, sec. 178), say:

> The reason usually assigned for the exemption of masters from liability to their servants is that a servant, in bargaining for his wages, takes into account all the ordinary risks of the business upon which he enters, and obtains a compensation which, upon the average, covers these risks, among which are reckoned the negligence of fellow-servants. Doctor Wharton thinks that this principle will not sustain the rule, because, he says: "No agreement

that a party shall be held irresponsible for his negligence * * * is valid." That ought to be the law, if it is not; but it does not prove that a contract against liability for an *agent's* negligence is void. And the cases cited by him only hold that a principal can not enforce an unreasonable restriction of his liability for his agent's negligence; a principle which we thoroughly approve. But even this principle is not universally accepted. Decisions can now be found both ways. The ingenious invention of Chief Baron Pollock, that no member of an establishment could maintain an action against its head for the fault of another member, which he was never weary of repeating, has never been accepted as a basis for this rule; and Doctor Wharton's proposed principle, that a coadventurer assumes the consequences of all risks incidental to the business is no more satisfactory. How can one "assume," by mere force of circumstances, a risk which he is not allowed to assume by express contract? *Chief Justice Shaw's theory that public policy requires that servants should have no remedy against their masters, in such cases, because the absence of any remedy will make them more careful of their own safety than they would otherwise be, reminds us of nothing so much as the opinion of Chief Justice Ruffin, in the days of slavery, that the law denied any remedy for any amount of torture to a slave, short of murder, out of humane regard to the best interests of the slaves themselves.* There is quite as much to be said on behalf of the latter proposition as of the former; perhaps more. We fully agree with Mr. Horace Smith, and

> with the British Parliament, that *true public policy* is opposed to the whole rule of exemption to masters as against their servants, *and that accidents would be far less frequent and the public interest better served* if the rule were entirely abolished. * * *

Brett, J., in *Lovell* v. *Howell* (L. R., 1 C. P. D., 161, 167), says:

> "Now, I decline to say, because I feel a difficulty in understanding or defining it, what is the precise principle on which the immunity of the master in these cases rests. But I am bound by law and by the authority of decided cases to say that such immunity does exist.

Carpenter, J., in *Zeigler* v. *Danbury, etc., R.Co.* (52 Conn., 543, 556), says:

> The defense of common employment has little of reason or principle to support it, and the tendency in nearly all jurisdiction is to limit rather than enlarge its range. *It must be conceded that it can not rest on reasons drawn from considerations of justice or of public safety.*

Earl, J., *Crispin* v. *Babbitt* (81 N. Y., 516, 528), says:

> The limitation has no foundation in abstract or natural justice; *and all attempts to place it upon any other foundation than that of public policy will prove unsatisfactory.*"

It is not necessary, upon this argument, to show that the policy of the fellow-servant rule is bad, although it is apparent that much can be and has been said against it, especially with reference to its

application to the more dangerous classes of employments. It is sufficient to show that the enforcement or abrogation of the rule is a matter of public policy, and being such, it is necessarily a matter for the consideration and control of the legislature under our governmental systems, to whom matters of public policy are primarily committed, and that Congress is the proper authority to determine what public policy requires with reference to common carriers engaged in interstate commerce.

IV.

Validity of State Legislation.

State legislation modifying or abolishing the common-law doctrine of common employment and assumption of risk has been uniformly sustained by the State and Federal courts, as a proper exercise of the police power.

Such legislation has been attacked on the ground (1) that it deprives the employer of his property without due process of law; (2) that, when directed against particular occupations, it denies the employers concerned the equal protection of the law; and (3) when accompanied, as it usually is, by a prohibition upon the making of contracts limiting the employer's liability, that it interferes with his constitutional liberty of contract. All of these contentions have been overruled. If unsound as to State legislation, they would be equally unsound as to Federal legislation, assuming the subject is within

the control of Congress with respect to common carriers engaged in interstate commerce.

The leading case on this subject is *Missouri Pacific Railway Co.* v. *Mackey*, 1888 (127 U. S., 205), where the court upheld the Kansas act of 1874, above quoted, which totally abolished the fellow-servant rule as to railroads.

In holding that such legislation did not deprive the railroads of property without due process of law in violation of the Fourteenth Amendment, the court, speaking by Mr. Justice Field, said (p. 208):

> The plain answer to this contention is that the liability imposed by the law of 1874 arises only for injuries subsequently committed; it has no application to past injuries, and it can not be successfully contended that the State may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every State. The hardship or injustice of the law of Kansas of 1874, if there be any, must be relieved by legislative enactment. The only question for our examination, as the law of 1874 is presented to us in this case, is whether it is in conflict with clauses of the Fourteenth Amendment. The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors; *but the same hardship and injustice, if there be*

any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. Whatever care and precaution may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine and fixes a like liability upon railroad companies where injuries are subsequently suffered by employees, though it may be by the negligence or incompetency of a fellow-servant in the same general employment and acting under the same immediate direction. *That its passage was within the competency of the legislature we have no doubt.*

The court further said (pp. 209–210):

The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application. * * *

But the hazardous character of the business of operating a railway would seem to call for

special legislation with respect to railroad corporations, *having for its object the protection of their employees as well as the safety of the public.* The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, *it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches* and to persons and corporations using steam in manufactories. (See *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S., 512, 523; *Barbier* v. *Connolly*, 113 U. S., 27; *Soon Hing* v. *Crowley*, 113 U. S., 703.)

This decision was followed in *Minneapolis, etc., Railway Co.* v. *Herrick* (127 U. S., 210), upholding a similar statute of the State of Iowa. And affirmed in Chicago, R.R. Co. v. Costello, 157 U.S. 70

The Iowa statute as originally enacted did not contain a provision invalidating contracts restricting liability. Subsequently such a provision was added. It had been held that, independent of such a provision, a contract of the character mentioned constituted a good defense, and such was the rule in Iowa (*Donald* v. *Railroad Co.*, 93 Iowa, 284; *Maine* v. *Railroad Co.*, 109 Iowa, 260), though in *Miller* v. *Chicago, Burlington and Quincy Railway* (65 Fed., 305), Circuit Court for the District of Colorado, and *Railway Company* v. *Spangler* (44 Ohio, 471) it was held otherwise. In *Baltimore and Ohio, etc., Railway Co.*

v. *Voigt* (176 U. S., 498) this court held a contract of employment exonerating the company from liability for any injury to the employee did not violate public policy.

In *McGuire* v. *Chicago, Burlington and Quincy Ry.*, 1906 (108 N. W., 902), the Supreme Court of Iowa upheld the amendment referred to. The court there said (p. 906):

> That legislation imposing upon railway companies special restrictions, obligations, and liabilities not generally applicable to other persons or corporations is not a denial of the equal protection of the laws has been so often decided as to be no longer a debatable question. Thus the courts have upheld statutes depriving railway companies of the benefit of the fellow-servant doctrine (*Herrick* v. *Railroad*, 31 Minn., 11; *Railroad* v. *Mackey*, 127 U. S., 205; *Railroad* v. *Herrick*, 127 U. S., 210), requiring a railway company to pay attorney's fees to the landowner in condemnation proceedings (*Gano* v. *Railroad*, 114 Iowa, 719; Id., 190 U. S., 557; subjecting railway corporations to double damages under certain circumstances (*Railroad Co.* v. *Humes*, 115 U. S., 512; *Railroad* v. *Beckwith*, 129 U. S., 26), denying railway corporations the right of appeal from assessment for taxation, although such right is given to owners of other taxable property (*Railroad* v. *Backus*, 154 U. S., 421), making such corporations liable without regard to negligence for fires set by their engines (*Railroad* v. *Matthews*, 174 U. S., 96), and requiring them to pay without discount to a discharged

> employee wages earned at the time of his discharge (*Railroad* v. *Paul*, 173 U. S., 404). In each of these cases, and in many others which might be cited, the statute under consideration was made applicable to railway companies only, and in each case it was vigorously assailed as a denial of the equal protection of the laws; but in each instance, after thorough argument, proceeding along the lines followed by the counsel for the appellee herein, the court of last resort has uniformly held the legislation to be a valid exercise of the police power of the States. In view of these decisions we think it beyond question that the statute here under consideration can not be said to be void as a denial of the equal protection guaranteed by the Fourteenth Amendment.

The court further said (p. 908):

> It is a settled proposition that the Fourteenth Amendment to the Federal Constitution was not intended to limit or hamper the States in the exercise of their police powers. (*Mugler* v. *Kansas*, 123 U. S., 623; *In re Kemmler*, 136 U. S., 436; *Ex parte Converse*, 137 U. S., 624; *Powell* v. *Pennsylvania*, 127 U. S., 678.) Considering a statute like our code, section 2071, the Minnesota court declares it to be "*a police regulation intended to protect life, person, and property by securing a more careful selection of servants and a more rigid enforcement of their duties by railroad companies.*" (*Mickelson* v. *Truesdale*, 65 N. W., 260.) *Nor is this protection confined to the employees alone. It*

> *tends as well to increase the safety of the millions of people and the vast aggregate of property daily transported by these companies, and the public interest is directly subserved and promoted by every reasonable rule or device by which negligence in such business is lessened or prevented.* The Ohio court, discussing a similar statute of that State, *has said that the liability is not created for the benefit of the employees alone, but has its reason and foundation in public necessity and policy.* (*Railroad Co.* v. *Spangler*, 44 Ohio St., 471.) See also *Kane* v. *Railroad Co.* (133 Fed., 681.)

In *Hancock* v. *Railway Co.* (124 N. C., 222), the Supreme Court of North Carolina upheld the "fellow-servant act" of 1897 of that State, which abolished the common-law doctrine of fellow-servant as to railroads and nullified contracts waiving the benefit of the statute. In its opinion in that case, the court said (p. 226):

> We see no ground for the defendant's contention that the act in question violates Article I, section 7, of the North Carolina constitution, by "conferring exclusive privileges upon any set of men." The law exempting a master from liability to a servant for the negligence of a fellow-servant is by judicial construction and of comparatively recent origin. Its history is traced in *Hobbs* v. *Railroad* (107 N. C., 1). Its extent has been differently outlined in different States by judicial construction, and in several States it has been restricted by legislative enactment so as not to extend to employees of railroad companies, as has now

been done in this State. As the original ground of the decision was that a servant knew the character, for care, of his fellow-servant, and entered service with a view to that risk, the courts themselves might logically have long since modified the ruling not to extend to an employment like that of railroads embracing many thousands of employees and exposing its servants to peculiar risks.

In *Pittsburgh, etc., Railway Co.* v. *Montgomery* (152 Ind., 1), the employers' liability act of Indiana of 1893, which made railroads and other corporations, except municipal, liable for injuries to their employees resulting from the negligence of coemployees, was held to be constitutional.

The Indiana statute has been held to make railroad companies answerable to their employees the same as strangers for the negligence of their servants in charge of signals, telegraph offices, switch yards, shops, road houses, locomotive engines, and trains upon their railways. (*Baltimore, etc., R. Co.* v. *Little*, 149 Ind., 167; *Baltimore, etc., R. Co.* v. *Peterson*, 156 Ind., 1).

In *Indianapolis, etc., R. Co.* v. *Houlehan* (157 Ind., 494), the statute was held to apply to a telegraph operator who had been injured in crossing the tracks of the railroad in the line of his duty, and the constitutionality of the statute again upheld.

In *Tullis* v. *Lake Erie and Western Railroad* (175 U. S., 348), the Indiana statute, as construed by the courts of that State, was held not to be in conflict

with the Constitution of the United States. Referring in support of its decision to *Orient Insurance Company* v. *Daggs* (172 U. S., 557), among other cases, the court said (pp. 352–353):

> In *Orient Insurance Company* v. *Daggs*, in which an act of the State of Missouri in respect of policies of insurance against loss or damage by fire was drawn in question, the objection that the statute discriminated between fire insurance companies and companies engaged in other kinds of insurance was overruled, and it was said that *the power of the State to distinguish, select, and classify objects of legislation necessarily had a wide range of discretion;* that it was sufficient to satisfy the demands of the Constitution if the classification were practical and not palpably arbitrary, and that the classification of the Missouri statute was not objectionable in view of the differences between fire insurance and other insurance. (*Railroad Company* v. *Mackey* and *Railroad Company* v. *Beckwith* were cited and approved. And see *Magoun* v. *Ill. Trust and Savings Bank*, 170 U. S., 283; *Pacific Express Co.* v. *Seibert*, 142 U. S., 339; *Atchison, Topeka, &c., Railroad* v. *Matthews*, 174 U. S., 96.)

In Georgia it is held that under the employers' liability act of that State "a railroad company is liable for injuries to the person of an employee by the negligence or misconduct of other employees of its company, whether such injuries are connected with the running of trains or otherwise." (*R. R. Co.* v. *Thompson*, 54 Ga., 509; *Georgia Railroad* v. *Ivey*,

73 Ga., 499; *Georgia Railroad* v. *Brown*, 86 Ga., 320.) And such statute has been held constitutional. (*Georgia Railroad Co.* v. *Miller*, 90 Ga., 571, 574.)

In *St. Louis and San Francisco Railway Co.* v. *Matthews* (165 U. S., 1) this court held that a statute of Missouri, making railroad corporations liable to the owner of property injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon its railroad, and giving the railroad an insurable interest in the property upon its route, did not deprive the company of its property without due process of law, or deny it the equal protection of the laws, or impair the obligation of the contract of incorporation between the State and the company which imposed no such liability. After referring to *Beer Co.* v. *Massachusetts* (97 U. S., 25) and *Missouri Pacific Railway* v. *Humes* (115 U. S., 512), the court said (pp. 25, 26):

> Like decisions, for like reasons, were made in the similar cases of *Minneapolis and St. Louis Railway* v. *Beckwith* (129 U. S., 26) and *Same* v. *Emmons* (149 U. S., 364), in which last case this court, again speaking by Mr. Justice Field, said: "The extent of the obligations and duties required of railway corporations or companies by their charters does not create any limitation upon the State against imposing all such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employees, or the protection of the property of adjoining owners. The imposing of

> proper penalties for the enforcement of such additional duties is unquestionably within the police powers of the States. No contract with any person, individual or corporate, can impose restrictions upon the power of the States in this respect." (149 U. S., 367, 368.)
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> In *Missouri Pacific Railway* v. *Mackey* (127 U. S., 205) the judgment of the Supreme Court of Kansas, 298, maintaining the constitutionality of a statute of the State imposing for the future upon every railroad corporation organized or doing business in the State a liability, to which no person or corporation was before subject, for all damages done to any of its employees by negligence or mismanagement of their fellow-servants, was affirmed by this court.

In *Holden* v. *Hardy* (169 U. S., 366) the court, upon like principles, upheld the constitutionality of an act of the State of Utah limiting the hours of labor in mines. In that case the court, speaking by Mr. Justice Brown, said (pp. 391–392):

> The right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has

held, notably in the cases of *Davidson* v. *New Orleans* (96 U. S., 97), and *Yick Wo* v. *Hopkins* (118 U. S., 356), that the police power can not be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and *a large discretion "is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests."* (*Lawton* v. *Steele*, 152 U. S., 133, 136.)

Again (pp. 397–399):

We have no disposition to criticise the many authorities which hold that State statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. *It is sufficient to say of them that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of the employees, and there are reasonable grounds for believing that such determination is supported by the facts.* The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class. The distinction between these two different classes of enactments can not be better stated than by a comparison of the views of this court found in the opinions

in *Barbier* v. *Connolly* (113 U. S., 27) and *Soon Hing* v. *Crowley* (13 U. S., 703) with those later expressed in *Yick Wo* v. *Hopkins* (118 U. S., 356).

In *St. Louis, Iron Mountain, etc., Railway* v. *Paul* (173 U. S., 404) the court sustained an act of the State of Arkansas making the wages of employees of railroad corporations due and payable at the time of their discharge and imposing a penalty for their nonpayment. Speaking by Chief Justice Fuller, the court said (pp. 409–410):

> In view of the fact that these corporations were clothed with a public trust, and discharged duties of public consequence affecting the community at large, the Supreme Court held the regulation, *as promoting the public interest in the protection of employees to the limited extent stated*, to be properly within the power to amend reserved under the State constitution.
>
> Inasmuch as the right to contract is not absolute, but may be subjected to the restraints demanded by the safety and welfare of the State, we do not think that conclusion in its application to the power to amend can be disputed on the ground of infraction of the fourteenth amendment. (*Orient Insurance Company* v. *Daggs*, 172 U. S., 557; *Holden* v. *Hardy*, 169 U. S., 366; *St. Louis and San Francisco Railway* v. *Matthews*, 165 U. S., 1.)
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> *Gulf, Colorado and Santa Fe Railway* v. *Ellis* (165 U. S., 150, 159) is not to the contrary and was properly distinguished from this case by the

Supreme Court of Arkansas. There a State statute provided for the assessment of an attorney's fee of not exceeding ten dollars against railroad companies for failure to pay certain debts, and the exaction was held to be a penalty, although no specific duty was imposed for the nonperformance of which it was inflicted. This Court said: "The statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; *a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes*, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State." The conclusion was that the subjection of railroad companies only to the penalty was purely arbitrary, not justifiable on any reasonable theory of classification, and that the statute denied the equal protection of the law demanded by the fourteenth amendment. In this case the act was passed "for the protection of servants and employees of railroads," and was upheld as an amendment of railroad charters, *such exercise of the power reserved being justified on public considerations*, and a duty was specially imposed for the failure to discharge which the penalty was inflicted. The penalty was sustained because the requirement was valid.

The power of the State to abridge the individual liberty of contract and action in the interest of the public safety as involved in railroad transportation is

See particularly Atchison &c. v. Mathews
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dealt with by Mr. Justice Harlan, who, in *Arthur* v. *Oakes* (63 Fed., 310), in discussing the rule that equity will not compel specific performance of personal services by employees, said (pp. 318–319):

> It is supposed that these principles are inapplicable or should not be applied in the case of employees of a railroad company, which, under legislative sanction, constructs and maintains a public highway primarily for the convenience of the people, and in the regular operation of which the public are vitally interested. Undoubtedly the simultaneous cessation of work by any considerable number of the employees of a railroad corporation, without previous notice, will have an injurious effect, and for a time inconvenience the public. But these evils, great as they are, and although arising in many cases from the inconsiderate conduct of employees and employers, both equally indifferent to the general welfare, *are to be met and remedied by legislation restraining alike employees and employers so far as necessary adequately to guard the rights of the public as involved in the existence, maintenance, and safe management of public highways. In the absence of legislation to the contrary,* the right of one in the service of a quasi public corporation to withdraw therefrom at such time as he sees fit, and the right of the managers of such a corporation to discharge an employee from service whenever they see fit, must be deemed so far absolute that no court of equity will compel him against his will to remain in such service or actually to perform the personal

acts required in such employments, or compel such managers against their will, to keep a particular employee in their service.

V.

Power of Congress to Regulate Instrumentalities of Interstate or Foreign Commerce.

The foregoing decisions show, beyond all question, that the liability of common carriers for injuries to their employees is a proper subject of governmental regulation, and that a State in the exercise of its police powers may make such reasonable regulations on the subject with respect to all carriers operating within its limits as the legislature thereof may deem necessary.

Being a proper subject of governmental regulation, the only question to be considered is whether Congress, in the exercise of its constitutional power to regulate interstate and foreign commerce, may not regulate the liability of such common carriers as are engaged in that commerce.

The answer to this question would seem to be contained in the definition of the power of Congress over interstate and foreign commerce given in *Gibbons* v. *Ogden* (9 Wheat., 1), where Chief Justice Marshall, speaking for the court, said (p. 197):

> We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. *This power*, like all others vested in Congress, *is complete in*

> *itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed in the Constitution.* These are expressed in plain terms and do not affect the questions which arise in this case or which have been discussed at bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States *is vested in Congress as absolutely as it would be in a single government* having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.

It has been shown that the regulation of the liability of common carriers to their employees for injuries received in the conduct of such business is necessary for the proper protection, not only of the employees themselves, but of passengers and property transported, and that such regulations do not violate the constitutional inhibition against the deprivation of liberty or property without due process of law, or deny the carrier the equal protection of the laws. It logically follows, if the power of Congress to regulate interstate and foreign commerce is as broad as above stated, that it is within the competency of that body to act on the subject with respect to such commerce.

From the foundation of the Government the power of Congress to regulate interstate and foreign commerce has been construed to extend to the regulation

of the instrumentalities by which such commerce is conducted, and the regulation of such instrumentalities to include control over the persons operating the same.

In his concurring opinion in *Gibbons* v. *Ogden*, Mr. Justice Johnson said (9 Wheat., 229):

> Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, *labor*, transportation intelligence, care, and various mediums of exchange become commodities and enter into commerce; *the subject, the vehicle, the agent, and their various operations* become the objects of commercial regulations. Shipbuilding, the carrying trade, and the *propagation of seamen* are such vital agents of commercial prosperity that the nations which could not legislate over these subjects would not possess power to regulate commerce.

In *Sherlock* v. *Alling* (93 U. S., 99) the court, speaking by Mr. Justice Field, said (pp. 103–104):

> It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, *the persons engaged in it, and the instruments by which it is carried on.* And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital, and other dues they shall be

> subjected; what rules they shall obey in passing each other; *and what provision their owners shall make for the health, safety, and comfort of their crews.* Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details *to guard against accident and consequent loss of life.*

In *Gloucester Ferry Co.* v *Pennsylvania* (114 U. S., 196), the court said (pp. 203–204):

> The power to regulate that [interstate] commerce, as well as commerce with foreign nations, is the power to prescribe the rules by which it shall be governed; that is, the condition upon which it shall be conducted, to determine when it shall be free and when subject to duties or other exactions. *The power also embraces within its control all the instrumentalities by which that commerce may be carried on.* The subjects therefore upon which the power and may be exerted are of infinite variety:

Pomeroy, in his treatise on Constitutional Law, discussing the power of Congress to regulate interstate and foreign commerce, says:

> SEC. 379. Under this analysis we shall discover that Congress has power to pass laws regulating
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> SEC. 380. (2) The means and instruments by which traffic and intercommunication may be carried on. Under this head are included that mass of statutes which collectivly are known as the "Registry" and "Navigation" laws. * * *

> SEC. 381. Other statutes, passed under the same exercise of legislative power, regulate the use and conduct of the ships themselves; *provide for the safety of crew and passengers* by prescribing rules concerning boilers, engines, medicines, bulk, ventilation, and the like; also the number of their crew, *the form and nature of their contract of hiring, their rights as against masters*, the powers of officers, etc. The number of such statutes is great, and their particular objects are numerous. Some require the appointment of new classes of official persons, such as inspectors of steamboats, etc. No one has, as yet, questioned the authority of Congress to enact such laws.

In *Patterson* v. *Bark Eudora* (190 U. S., 169), this court, speaking by Mr. Justice Brewer, upheld the authority of Congress under its grant of power to regulate interstate and foreign commerce, to enact legislation for the protection of seamen engaged in such commerce, the specific legislation in question being the provisions in regard to the payment of seamen's wages contained in the act of December 21, 1898 (30 Stat., 755, 763).

It was contended in that case that the act in question interferes with the citizen's liberty of contract. As stated by the court, it was also contended—

> Further, that even if the contract be one subject to restraint under the police power, that power is vested in the States and not in in the General Government; and any restraint, if exercised at all, can only be by the State in

> which the contract is entered into; that the only jurisdiction possessed by Congress in respect to such matters is by virtue of its power to regulate commerce, interstate and foreign; *that the regulation of commerce does not carry with it the power of controlling contracts of employment by those engaged in such service any more than it includes the power to regulate contracts for service on interstate railroads* or for the manufacture of goods which may be intended for interstate or foreign commerce; * * *

The court overruled all these contentions, and in conclusion said (p. 179):

> *We are of the opinion that it is within the power of Congress to protect all sailors shipping in our ports on vessels engaged in foreign or interstate commerce,* whether they belong to citizens of this country or of a foreign nation, and that our courts are bound to enforce those provisions in respect to foreign equally with domestic vessels.

In *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* (96 U. S., 1, 9) the court, per Chief Justice Waite, said:

> The powers thus granted are not confined to the instrumentalities of commerce or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstance. They extend from the horse with its rider to the stage coach, from the sail-

> ing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought in use to meet the demands of increasing population and wealth.

In *Brown* v. *Houston* (114 U. S., 622, 630), the court, speaking by Mr. Justice Bradley, said:

> The power to regulate commerce among the States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations.

A like view was expressed in *Bowman* v. *Chicago, etc., Railway Co.*, 125 U. S., 465, 482; *Crutcher* v. *Kentucky*, 141 U. S., 47, 58, and *Pittsburg Coal Co.* v. *Bates*, 156 U. S., 577, 587.

In *Stockton* v. *Baltimore & N. Y. R. R. Co.* (32 Fed., 9), Mr. Justice Bradley said:

> With regard to commerce it has been expressly held that it is not confined to commercial transactions, but extends to seamen, ships, navigation, and the appliances and facilities of commerce, and it must extend to this or it would not embrace the whole subject. Under this power the navigation of rivers and harbors has been opened and improved, and we have no doubt that canals and waterways may be opened to connect navigable bays, harbors, and rivers with each other, or with the interior of the country. Nor have we any doubt that, under the same power, the means of commercial communication by land as well as by water may be opened up by Congress between the different States whenever it shall seem fit to do

> so through the failure of the States to provide such communication, or whenever, in the opinion of Congress, increased facilities of communication ought to exist.

In *California* v. *Pacific Railroad Co.* (127 U. S., 1, 39), the court, speaking by Mr. Justice Bradley, and referring to the legislation by Congress in aid of the construction of a transcontinental railroad, said:

> It can not at the present day be doubted that Congress, under the power to regulate commerce among the States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws.

Quite recently the court, in upholding the authority of Congress to construct the Panama Canal, reiterated its adherence to the views expressed in this case. (*Wilson* v. *Shaw*, 204 U. S., 24.)

In the Debs case (158 U. S., 564) the court, speaking by Mr. Justice Brewer, said (p. 578):

> What are the relations of the General Government to interstate commerce and the transportation of the mails? *They are those of direct supervision, control, and management.* While under the dual system which prevails with us the powers of government are distributed between the State and the Nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty and in the exercise of those enumerated powers acts directly upon the citizen, and not through the intermediate agency of the State.

The court then reviews the legislation by Congress in respect to interstate railroad transportation, referring, among others, to the act of June 15, 1866, now section 5258 of the Revised Statutes, authorizing, in virtue of its power to regulate commerce among the States, to establish post-roads, and to raise and support armies, every steam railroad in the country to transport passengers, troops, Government supplies, mails, freight, and property on their way from one State to another State, etc.; the act to regulate commerce of February 4, 1887, and its amendments; the act of October 1, 1888, c. 1063, 25 Stat., 501, providing for arbitration between railroad interstate-commerce companies and their employees, and the safety-appliance act of March 2, 1893, c. 196, 27 Stat., 531.

After referring generally to the mass of legislation in respect to post-offices and post-roads, the court says (p. 580):

> Obviously these powers given to the National Government over interstate commerce and in respect to the transportation of the mails were not dormant and unused. Congress had taken hold of these matters, and by various and specific acts had assumed and exercised the powers given to it, and was in the full discharge of its duty to regulate interstate commerce and carry the mails. The validity of such exercise and the exclusiveness of its control has been again and again presented to this court for consideration. * * *

> As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the National Government, *and Congress by virtue of such grant has assumed actual and direct control*, it follows that the National Government may prevent any unlawful and forcible interference therewith.

In the Lottery case (188 U. S., 321), where it was held that the power of Congress to "regulate" interstate and foreign commerce extended to the absolute exclusion of certain articles from the channels of trade, the court, speaking by Mr. Justice Harlan, after citing various authorities, said (pp. 352–353):

> This reference to prior adjudications could be extended if it was necessary to do so. The cases cited, however, sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce clause. They show that commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph.
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> They also show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost, subject *only* to such limitations as the Constitution imposes upon

> the exercise of the powers granted by it; *and that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts simply because in their opinion such regulations may not be the best or most effective that could be employed.*

In *United States* v. *Joint Traffic Association* (171 U. S., 505, 569), the court held that the Sherman antitrust act was a constitutional exercise of the power of Congress to regulate interstate commerce, and did not unlawfully intrench upon the citizens liberty of contract, although it was held to extend to contracts in reasonable as well as unreasonable restraint of trade. Speaking by Mr. Justice Peckham, the court said (pp. 571–573):

> *The prohibition of such contracts may, in the judgment of Congress, be one of the reasonable necessities for the proper regulation of commerce, and Congress is the judge of such necessity and propriety,* unless, in case of a possible gross perversion of the principle, the courts might be applied to for relief.
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> * * * * *
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> Notwithstanding the general liberty of contract which is possessed by the citizen under the Constitution, we find that there are many kinds of contracts which, while not in themselves immoral or *mala in se*, may yet be prohibited by the legislation of the States or, in certain cases, by Congress. The question comes back whether the statute under review is a legitimate exercise of the power of Con-

> gress over interstate commerce and a valid regulation thereof. *The question is, for us, one of power only and not of policy.* We think the power exists in Congress and that the statute is therefore valid.

It will doubtless be argued that if this matter is subject to regulation at all it can only be by the States. But the answer to this is that the regulation of interstate commerce has been committed by the Constitution to Congress; and while State legislation, passed in the exercise of its police power, may control the liability of common carriers within their limits, even though they be engaged in interstate commerce, yet such legislation must yield to the plenary and paramount authority of Congress over interstate commerce whenever it chooses to exercise it.

As pointed out by Chief Justice Marshall in *Gibbons* v. *Ogden*, in holding that the States had no concurrent power with Congress to regulate interstate commerce, like measures may flow from different sources, and therefore Congress, in the exercise of the power to regulate interstate commerce, may use the same identical means for its protection or regulation that the State may have employed for the accomplishment of like ends in the exercise of their police powers. Thus, referring to the quarantine, inspection, health and other legislation of the States, the court said (9 Wheat., 204):

> No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach

them, it must be for national purposes; it must be where the power is expressly given for a special purpose or is clearly incidental to some power which is expressly given. It is obvious that the Government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State. *If Congress license vessels to sail from one port to another, in the same State, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police.* So, if a State, in passing laws on subjects acknowledged to be within its control and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

The books are full of cases in which State legislation affecting common carriers engaged in interstate commerce has been assailed as invasions of the power of Congress to regulate such commerce. Such legislation has usually been sustained, however, as valid exertions of the police power of the States; but in so doing the court has always been careful to indicate that it must yield to similar legislation by Congress in respect to such commerce whenever it chooses to exercise its power.

Gibbons v. *Ogden*, 9 Wheat., 1, 210.

Cooley v. *Board of Wardens*, 12 How., 299, 320.

Morgan v. *Louisiana*, 118 U. S., 455, 463.

Smith v. *Alabama*, 124 U. S., 465.

Nashville, Chattanooga & St. Louis Ry. v. *Alabama*, 128 U. S., 96, 100.

Western Union Telegraph Co. v. *James*, 162 U. S., 650, 662.

Hennington v. *Georgia*, 163 U. S., 299, 317.

New York, New Haven & Hartford Railroad v. *New York*, 165 U. S., 628, 631.

Missouri, Kansas & Texas Railway v. *Haber*, 169 U. S., 613, 626.

Rasmussen v. *Idaho*, 181 U. S., 198, 200.

Reid v. *Colorado*, 187 U. S., 137.

In *Smith* v. *Alabama* the court sustained a statute of Alabama requiring all locomotive engineers in that State, whether they served on trains engaged in domestic or interstate commerce, to be examined and licensed by a State board, Congress not having legislated on the subject.

In *Nashville, etc., Railway* v. *Alabama*, which involved the validity of a statute of the State requiring locomotive engineers, firemen, conductors, brakemen, etc., to undergo medical examination to discover whether their sight was good, and which disqualified persons afflicted with color blindness or defective vision from serving in such capacities on trains, the court said (128 U. S., 99):

> It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and *liabilities* of employees and others on railway trains engaged in that commerce, and that such legislation will supersede any State action on the subject. *But until such legislation is had*, it is clearly within the competency of the State to provide against accidents on trains whilst within their limits.

In *New York, New Haven and Hartford Railroad* v. *New York*, where a statute of New York regulating the heating of steam passenger cars and requiring guards and guard posts to be placed on railroad bridges and trestles was attacked as an interference with the power of Congress to regulate interstate commerce, the court said (165 U. S., 631):

> According to numerous decisions of this court (some of which are cited in the margin) sustaining the validity of State regulations enacted under the police powers of the State, and which incidentally affected commerce among the States and with foreign

nations, it was clearly competent for the State of New York, *in the absence of national legislation covering the subject*, to forbid under penalties the heating of passenger cars for that State by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in interstate commerce. *While the laws of the States must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution* (*Gibbons* v. *Ogden*, 1 Wheat., 1, 211), the mere grant to Congress of the power to regulate commerce with foreign nations and among the States did not of itself and without legislation by Congress, impair the authority of the States to establish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people.

VI.

Decisions Recognizing the Power of Congress to Regulate the Liability of Common Carriers Engaged in Interstate and Foreign Commerce.

The power of Congress to regulate the liability of common carriers and others engaged in interstate commerce for injuries to persons or property has been distinctly recognized in several cases.

In *Sherlock* v. *Alling* (93 U. S., 99) it was contended that a statute of Indiana changing the common-law rule that actions *ex delicto* die with the person could not be applied to cases where the injuries complained of were caused by marine torts without interfering with the exclusive power to regulate commerce vested

in Congress. But the statute was held to be a valid exercise of the police power of the State, and applicable to interstate commerce in the absence of legislation by Congress on the subject. After making the statements above quoted in regard to the power of Congress to control the instrumentalities of interstate commerce and referring to the legislation it had enacted for the regulation of navigation, the court said:

> The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. *Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of State authority.* But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, *the laws of Congress are silent*, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said generally that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or

> interstate, or in any other pursuit. In our judgment, the statute of Indiana falls under this class. *Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured,* we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress. (*United States* v. *Bevans,* 3 Wheat., 337.)

It is difficult to see why, if Congress may regulate the liability of common carriers and others engaged in interstate commerce to strangers, it may not regulate their liability to their employees, the protection of interstate commerce being as much involved in the one case as in the other.

That no valid distinction can be made between these two matters appears from the opinion of this court in *Missouri Pacific Railway* v. *Mackey, supra,* and also from the case of *Peirce* v. *Van Dusen* (78 Fed., 693), decided by the Circuit Court of Appeals for the Sixth Circuit, constituted of Harlan, circuit justice, and Taft and Lurton, circuit judges, Mr. Justice Harlan delivering the opinion of the court.

The principal question before the court in *Peirce* v. *Van Dusen,* the opinion states, was whether an act of the State of Ohio, abrogating to a certain extent the fellow-servant rule in respect to railroads and forbidding the making by the railroads of certain con-

tracts of exemption from liability to their employees was applicable to cases against the receiver of a railroad corporation acting under the orders of a Federal court. The railroad there concerned was that of the Toledo, St. Louis and Kansas City Railroad Company. Peirce, the receiver, was sued by Van Dusen, a yard brakeman, who had been injured through the carelessness of a conductor employed by the receiver. In determining the question presented, it was necessary to consider whether the State statute applied to a common carrier engaged in interstate commerce, as the railroad concerned was an interstate road. In that connection, after holding that the statute applied as well to a receiver as to a railroad corporation, the court said (p. 698):

> Such legislation is not liable to the objection that it encroaches upon Federal authority, or upon the jurisdiction or power of the United States court. *The statute does nothing more than to prescribe a rule of action to be observed by all within the State.* The authority to enact it is derived from the general power of the State to regulate the exercise of the relative rights and duties, and to provide for the safety of all persons within its territorial jurisdiction. It is the duty of the Federal court sitting in this State to enforce all enactments having such objects in view, unless they encroach upon the powers and authority of the United States. That duty arises out of the statute declaring that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide,

shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." (Rev. Stat., sec. 721; *Baltimore & O. R. Co.* v. *Camp*, 31 U. S. App., 213; 13 C. C. A., 233, and 65 Fed., 952.) Indeed, if Congress had not so declared, this court, upon principles of comity, *and in support of the public policy of the State*, might well recognize and enforce, in actions brought against receivers of railroads, any rule established by the State for like actions brought against railroad companies.

The Ohio statute is not applicable alone to railroad corporations of Ohio engaged in the domestic commerce of this State. It is equally applicable to railroad corporations doing business in Ohio, *and engaged in commerce among the States*, although the statute, in its operation, *may affect in some degree a subject over which Congress can exert full power.* The States may do many things affecting commerce with foreign nations and among the several States until Congress covers the subject by national legislation. This principle is illustrated in many cases; * * *.

After citing *Cooley* v. *Board*, *Sherlock* v. *Alling*, and other cases above referred to, the court said (p. 700):

Undoubtedly the whole subject of the liability of interstate railroad companies for the negligence of those in their service may be covered by national legislation enacted by Congress under its power to regulate commerce among the States. But, *as Congress has not dealt with that subject*, it was competent for Ohio to declare that

> an employee of any railroad corporation doing business here, including those engaged in commerce among the States, shall be deemed, in respect to his acts within this State, the superior, not the fellow-servant, of other employees placed under his control.

This plain and unequivocal declaration by the eminent jurists composing that court is certainly entitled to the highest respect. It was not *obiter*, but necessarily involved in the question presented. If Congress had no power to legislate, on the subject it was unnecessary to go into the matter at all. But because they recognized the fact that the subject, was within the control of Congress, that its power over interstate commerce was involved, it was necessary to consider the validity of the State regulation as affecting that commerce.

That the liability of common carriers engaged in interstate commerce for injuries to their employees occasioned by their negligence is a matter that vitally enters into and affects such commerce was recognized by Mr. Justice Brewer in delivering the opinion of the court in *Baltimore and Ohio Railroad* v. *Baugh* (149 U. S., 368). After referring to the long line of authorities holding that the question of the liability of a railroad company for injuries to its servants was a matter of general and not of local law which the court, in the absence of express statute on the subject, would determine for itself, the learned justice said (pp. 378–379):

> But passing beyond the matter of authorities, the question is essentially one of general

law. It does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property, but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the "common law." There is no question as to the power of the States to legislate and change the rules of the common law in this respect as in others; but in the absence of such legislation the question is one determinable only by the general principles of that law. *Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the States is a matter of national regulation,* and to establish it as such was one of the principal causes which led to the adoption of our Constitution. To-day the volume of interstate commerce far exceeds the anticipation of those who framed the Constitution, and the main channels through which this interstate commerce passes are the railroads of the country. Congress has legislated in respect to this commerce not merely by the interstate commerce act and its amendments (24 Stats., 379, c.104) but also by an act passed at the last session, requiring the use of automatic couplers on freight cars (Public Acts, 52d Cong., 2d sess., c. 113). The lines of this very plaintiff in error extend into half a dozen or more States, and its trains are largely employed in interstate commerce. *As it passes from State to State, must the rights, obligations, and duties subsisting between it and its employees change at*

every State line? If to a train running from Baltimore to Chicago it should, within the limits of the State of Ohio, attach a car for a distance only within that State, ought the law controlling the relation of a brakeman on that car to the company to be different from that subsisting between the brakeman on the through car and the company? Whatever may be accomplished by statute—and of that we have now nothing to say—it is obvious that the relations between the company and employee are not, in any sense of the term, local in character, but are of a general nature and to be determined by the general rules of the common law. The question is not local but general. It is also one of the vexed questions of the law, and perhaps there is no one matter upon which there are more conflicting and irreconcilable decisions in the various courts of the land than the one as to what is the test of a common service, such as to relieve the master from liability for the injury of one servant through the negligence of another.

The decison of the court in the Baugh case did not tend to relieve the situation referred to. The court there held that a fireman upon a locomotive was the fellow-servant of the engineer and could not recover for injuries received through the latter's negligence, although, under the rules of the company, the engineer, in the absence of the conductor, was regarded as the conductor, and directed to act accordingly. Under the decisions of the Ohio courts, where the accident occurred, the fireman could have recovered.

No one can successfully question the correctness of the court's statement that the liability of a common carrier engaged in interstate commerce for injuries to its employees is a question in which the whole country is interested, and should be governed by a uniform rule. But simply holding that the question is one of general law, which a Federal court may determine for itself in the absence of a State statute on the subject, does not tend to secure the desired uniformity, but only causes greater complexity of decision. Besides, most of the States have legislated on the subject and their statutes are conflicting. Uniformity of decision, it is manifest, can only be secured by national legislation.

In favorably reporting the bill which was finally enacted into the law here in question the Judiciary Committee of the House said:

> A Federal statute of this character will supplant the numerous State statutes on the subject, so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all the States.

In *Chicago, Milwaukee and St. Paul Railway Co.* v. *Solan* (169 U. S., 133) the court held that a statute of Iowa, providing that "no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of pas-

sengers, which would exist had no contract, receipt, rule, or regulation been made or entered into," as applied to an interstate shipment, did not contravene the provision of the Constitution empowering Congress to regulate interstate commerce. The decision was expressly rested upon the ground that Congress had not legislated on the subject. The court said (p. 137):

> Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of a State, are subject to its law. It is in the law of the State that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a State, to the protection of that State as those who travel on domestic trains. A carrier exercising his calling within a particular State, *although engaged in the business of interstate commerce*, is answerable, according to the law of the State, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper

> to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the State has the power to redress and to punish. *The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use*, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, *although they control in some degree the conduct and the liability* of those engaged in such commerce. *So long as Congress has not legislated upon the particular subject*, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits.

In *Pennsylvania R. R. Co.* v. *Hughes* (191 U. S., 477) the court held that a rule of judicial decision of the State of Pennsylvania which forbade a common carrier from limiting its liability for injuries to passengers or property transported did not, as applied to interstate transportation, amount to an unconstitutional interference with the power of Congress to regulate interstate commerce. The court said (p. 487):

> *It may be assumed that under the broad power conferred upon Congress over interstate commerce, as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit*

> *its liability* in a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied on (the act to regulate commerce) we fail to find any such provision therein.

In *Martin* v. *Pittsburg and Lake Erie Railroad Company* (203 U. S., 284) the whole subject was succinctly reviewed. It was contended in that case that a statute of Pennsylvania providing that "when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car, therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee," was unconstitutional as applied to a railway postal clerk in the employ of the United States on a route extending from Cleveland, Ohio, to Pittsburg, Pa., and who was injured through the derailing in Pennsylvania of his train by the negligence of the crew of a work train in permitting a switch to be open.

After referring to *Price* v. *Railroad Co.* (113 U. S., 218) as foreclosing the contention that the statute of Pennsylvania was in conflict with the power of Congress to establish post-offices and post-roads, the court, speaking by Mr. Justice White, said:

> This brings us to the second contention, the repugnancy of the Pennsylvania statute to the commerce clause of the Constitution. * * *

Under the circumstances we have stated, the case of *Pennsylvania Railroad Co.* v. *Hughes* (191 U. S., 477) clearly establishes the unsoundness of the contention that the Pennsylvania statute in question was void because in conflict with the commerce clause. In that case a horse was shipped from a point in the State of New York to a point in the State of Pennsylvania under a bill of lading which limited the right of recovery to not exceeding $100 for any injury which might be occasioned to the animal during the transit. The horse was hurt within the State of Pennsylvania through the negligence of a connecting carrier. In the courts of Pennsylvania, applying the Pennsylvania doctrine, which denies the right of a common carrier to limit its liability for injuries resulting from negligence, a recovery was had in the sum of $10,000, the value of the animal. On writ of error from this court the judgment of the Supreme Court of Pennsylvania was affirmed, it being held that, *at least in the absence of legislation by Congress on the subject*, the effect of the commerce clause of the Constitution was not to deprive the State of Pennsylvania of authority to legislate as to those within its jurisdiction concerning the liability of common carriers, although such legislation might to some extent indirectly affect interstate commerce. The ruling in the Hughes case in effect but reiterated the principle adopted and applied in *Chicago, Milwaukee, etc., Ry. Co.* v. *Solan* (169 U. S., 133), where an Iowa statute forbidding a common carrier from contracting to exempt itself from liability was sustained

as to a person who was injured during an interstate transportation.

The contention that because in the cases referred to the operation of the State laws, which were sustained, was to augment the liability of a carrier, therefore the rulings are inapposite here, where the consequence of the application of the State statute may be to lessen the carrier's liability, rests upon a distinction without a difference. The result of the previous rulings was to recognize, *in the absence of action by Congress*, the power of the States to legislate, and of course this power involved the authority to regulate as the State might deem best for the public good, without reference to whether the effect of the legislation might be to limit or broaden the responsibility of the carrier. In other words, the assertion of Federal right is disposed of when we determine the question of power, and doing so does not involve considering the wisdom with which the lawful power may have been under stated conditions exerted.

And the views previously stated are adequate to dispose of the assertion that the Pennsylvania statute is void for repugnancy to the fourteenth amendment. * * *

The contention that because plaintiff in error, as a citizen of the United States, had a constitutional right to travel from one State to another he was entitled, as the result of an accident happening in Pennsylvania, to a cause of action not allowed by the laws of that State, is in a different form to reiterate that the Pennsylvania statute was repugnant to the

> commerce clause of the Constitution of the United States. Conceding, if the accident had happened in Ohio, there would have been a right to recover, that fact did not deprive the State of Pennsylvania of its authority to legislate so as to affect persons and things within its borders. *The commerce clause not being controlling in the absence of legislation by Congress,* it follows of necessity that the plaintiff in error, as an incident of his right to travel from State to State, did not possess the privilege, as to an accident happening in Pennsylvania, to exert a cause of action not given by the laws of that State, and had no immunity exempting him from the control of the State legislation.

The act here in question is not limited to common carriers by railroad. In making it apply to all common carriers engaged in interstate or foreign commerce Congress simply exercised the discretion which the court recognized might be so exercised by the legislature in *Missouri Pacific Railway Co.* v. *Mackey* (127 U. S., 210).

The power of Congress to legislate in this way for the protection of the employees of common carriers engaged in interstate or foreign commerce by water can not possibly be questioned, in view of the adjudcation by this court in *Patterson* v. *The Bark Eudora* (190 U. S., 169), above referred to.

In this connection it is legislation instructive to observe that the Statutes of the United States (act of Mar. 3, 1851, secs. 4283, 4289, Rev. Stats.) limiting the liability of owners of vessels for the

embezzlement, loss, or destruction of property, goods, or merchandise shipped therein, or for injury by collision, or for the tortious acts of others to which the owner was not privy, has been rested upon the power of Congress to regulate interstate and foreign commerce (*Lord* v. *Steamship Co.*, 102 U. S., 541; *The Katie*, 40 Fed., 480), although in *In re Garnett* (141 U. S., 1) the court held that it was unnecessary to invoke the power of Congress under that clause, as the statute was to be regarded as an amendment of the maritime law which was necessarily under the control of Congress, in view of the provision that the judicial power of the United States should extend to cases of admiralty and maritime jurisdiction.

Obviously, the grant of judicial power to the courts is not equivalent to a grant of legislative power to Congress, although it may presuppose such a grant. We must look elsewhere for the authority of Congress to legislate on the subject of the maritime law. Confronted with this situation, the court, in the *Lottawanda* (21 Wall., 558, 576–577), said:

> But we must always remember that the court can not make the law; it can only declare it. If within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It can not be supposed that the framers of the Constitution contemplated that the [maritime] law should forever remain unalterable. *Congress undoubtedly has authority*

> *under the commercial power, if no other,* to introduce such changes as are likely to be needed. The scope of the maritime law and that of commercial regulations are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrollment, license, and nationality of ships and vessels, the method of recording bills of sale and mortgages thereon, *the rights and duties of seamen, the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews,* and many other things of a character truly maritime.

This language is quoted with approval in *In re Garnett* and also in the case there relied on of *Butler* v. *Steamship Co.* (130 U. S., 527), Mr. Justice Bradley speaking for the court in all three cases.

As pointed out by Judge Speer in *The Katie*, supra, the limited liability act was passed by Congress for the purpose of fostering and encouraging the American merchant marine, the American foreign carrying trade. Such also was undoubtedly the purpose of the Harter Act, approved February 13, 1893 (27 Stat., 445), which has been liberally construed and applied by this court in a number of cases.

Calderon v. *Atlas Steamship Co.*, 170 U. S., 272.

The Carib Prince, 170 U. S., 655.

The Silvia, 171 U. S., 462.

Knott v. *Botany Mills*, 179 U. S., 69.

International Nav. Co. v. *Farr etc. Mfg. Co.*, 181 U. S., 218.

In *Knott* v. *Botany Mills*, the court said (179 U. S., 71):

> Before the act of Congress of February 13, 1893, c. 105 (27 Stat., 445), known as the Harter Act, it was the settled law of this country, as declared by this court, that common carriers, by land or sea, could not by any form of contract exempt themselves from responsibility for loss or damage arising from negligence of their servants, and that any stipulation for such exemption *was void as against public policy;* although the courts in England and some of the States held otherwise. *Railroad Co.* v. *Lockwood*, 17 Wall., 357; *Liverpool Steam Co.* v. *Phoenix Ins. Co.*, 129 U. S., 397; *Compania La Flecha* v. *Brauer*, 168 U. S., 104, 117, 118.

The first section of the Harter Act prohibits masters or owners of vessels transporting merchandise or property from or between ports of the United States and foreign ports from contracting to limit their liability for loss or damage arising from negligence, fault, or failure in the proper loading, stowage, custody, care, or proper delivery of the merchandise or property committed to their charge. On the other hand, section 3 exempts them from liability for damage or loss resulting from faults or errors in navigation or in the management of their vessels if they have exercised due diligence to render them seaworthy and properly manned, equipped, and supplied.

It will be remembered that in *Pennsylvania R. R. Co.* v. *Hughes* (191 U. S., 477, 487) the court said:

> It may be assumed that under the broad power conferred upon Congress *over interstate commerce* as defined in repeated decisions of this court, it would be lawful for that body to make provisions as to contracts for interstate carriage, permitting the carrier to limit its liability in a particular sum in consideration of lower freight rates for transportation.

An act regulating the liability of common carriers engaged in interstate or foreign commerce by water would seem to be as much an exercise of the power of Congress to regulate such commerce as an act regulating the liability of common carriers by land.

The power of Congress to change the rule which forbids a common carrier from limiting its liability for injuries to property transported by it is assumed to be beyond question in *Pennsylvania R. R. Co.* v. *Hughes, supra.* The power of Congress to limit the liability of common carriers by water for losses occasioned to shippers by the negligence of their servants, as provided in the limited liability act of 1851 and the Harter Act, is also beyond question in view of the decisions of this court. The power of Congress to enact all necessary legislation for the protection of seamen is conclusively settled by *Patterson* v. *The Bark Eudora* (190 U. S., 169). The only point left undecided is whether Congress can likewise protect the employees of common carriers

engaged in interstate commerce by land. The practically conceded constitutionality of the safety-appliance act would seem to be an answer to this question. It would be strange, indeed, if it should be held that Congress can protect everything and everybody connected with interstate commerce—the carrier, the passenger, the stranger, the merchandise—but could not protect the persons employed to carry it on, those that bear the heat and burden of the day.

VII.

It is for Congress to Determine what Public Policy Requires with Respect to Common Carriers Engaged in Interstate Commerce by Land or Water.

It is clear that the rule which forbids a recovery against an employer by an employee who has been injured through the negligence of a fellow-servant, like the rule which forbids a common carrier from limiting its liability for injuries to persons or property transported by it, and like the rule that actions *ex delicto* die with the person, is a rule founded on the supposed requirements of public policy.

What does public policy require or permit with respect to the employees of common carriers engaged in interstate commerce by land? Would the public interest be subserved by making such carriers liable to their employees as well as to strangers for their negligence? Would such a rule tend to lessen the

dangers of transportation by stimulating such carriers to the exercise of greater care and caution in the selection and treatment of their servants, or would it increase such dangers by engendering laxity and carelessness on the part of employees, as the courts who are responsible for the present rule seem to have thought? These are the considerations to be resolved, and they all go to show, that Congress necessarily is the proper body to determine what public policy requires with respect to common carriers engaged in interstate commerce.

Suppose Congress had not legislated as it has, but that all the States had enacted such legislation, and experience had demonstrated that the liability thus imposed upon common carriers was contrary to the public interests and greatly increased the dangers of transportation through the laxity it created, would it be contended, in such event, that Congress was without authority to protect interstate commerce by enacting a different rule as to common carriers engaged therein? Assuredly not.

It is for Congress, and not for the courts, to determine what character of regulation the interests of interstate commerce require. This was evidently the view of this court when, in *United States* v. *Joint Traffic Association*, it said (171 U. S., 571):

> *The prohibition of such contracts may, in the judgment of Congress, be one of the reasonable necessities for the proper regulation of such com-*

> *merce, and Congress is the judge of such necessity and propriety,* unless in the case of a possible gross perversion of the principle the courts might be applied to for relief.

That there is no gross perversion of the principle in this case is indisputable. The business of common carriers has ever been recognized as a proper basis of classification, and the dangers of railroading, which is the class of carriers primarily referred to, are apparent to all.

In *Missouri Pacific Railway Co.* v. *Mackey,* supra, this court in upholding the Kansas statute, said:

> It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, *it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches,* and to persons and corporations using steam in manufactories.

It is true that in *Lochner* v. *New York* (198 U. S., 45) this court held that a statute of New York limiting the hours of labor in bakeries was an arbitrary interference with the individual's liberty of contract, but, unlike common carriers, and particularly railroads, the bakery business had never been generally regarded as dangerous or unhealthful or as demanding special legislation.

Possibly the rule established by Congress is unwise, possibly it is extreme, but neither of these considera-

tions justifies the interference of the judiciary or is an argument against the existence of the power.

> *United States* v. *Joint Traffic Association*, 171 U. S., 569, 571, 573.
> *Gibbons* v. *Ogden*, 9 Wheat., 1.
> *The Lottery case*, 188 U. S., 363.
> *McCray* v. *United States*, 195 U. S., 27, 55.

In *United States* v. *Joint Traffic Association* the court, in sustaining the antitrust act, said (171 U. S., 573):

> The question is, for us, one of power only and not of policy. We think the power exists in Congress and that the statute is therefore valid.

In *Gibbons* v. *Ogden* the court said:

> The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments.

VIII.

Power of Congress to Regulate Instrumentalities of Interstate Commerce not dependent upon Mode of Creation.

The decisions of this court above cited which recognize the authority of Congress to regulate the conduct and liability of common carriers engaged in interstate commerce do not restrict its power to corporations created by them. Necessarily that is an immaterial fact. While a corporation may get from a State its franchise to engage in interstate commerce, it can only exercise that franchise subject to the regulations which Congress may make for the protection of interstate commerce.

Thus, in *Hale* v. *Henkel* (201 U. S., 43), the court, in holding that an officer of a State corporation could not refuse to produce the books of the corporation because it might incriminate the corporation, said (p. 75):

> It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the legislature of that State; but such franchises, so far as they involve questions of interstate commerce, *must also be exercised in subordination to the power of Congress to regulate such commerce*, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being

> subject to this dual sovereignty the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular, in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over State corporations.

In the Northern Securities Case (193 U. S., 197) Mr. Justice Harlan, in delivering the judgment of the court, said (pp. 345–346):

> We reject any such view of the relations of the National Government and the States composing the Union as that for which the defendants contend. Such a view can not be maintained without destroying the just authority of the United States. It is inconsistent with all the decisions of this court as to the powers of the National Government over matters committed to it. No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such

commerce. It can not be said that any State may give a corporation created under its laws authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land. And yet the suggestion is made that to restrain a State corporation from interfering with the free course of trade and commerce among the States, in violation of an act of Congress, is hostile to the reserved rights of the States. The Federal court may not have power to forfeit the charter of the Securities Company, it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce.

The control of Congress over common carriers engaged in interstate commerce, irrespective of their mode of creation, is well illustrated by the case of *New York, New Haven and Hartford Railroad Co.* v. *Interstate Commerce Commission* (200 U. S., 361). In that case it was held, in effect, that Congress could prohibit such a carrier from engaging in any business

that would conflict with its duties as a carrier. The court said (p. 399):

> It is urged that if the requirement of the act to regulate commerce as to the maintenance of published rates and the prohibitions of that act against undue preferences and discriminations be applied to a carrier when engaged in buying and selling a commodity which it transports, the substantial effect will be to prohibit the carrier from becoming a dealer when no such prohibition is expressed in the act to regulate commerce, and hence a prohibition will be implied which should only result from express action by Congress. Granting the premise, the deduction is unfounded. Because no express prohibition against a carrier who engages in interstate commerce becoming a dealer in commodities moving in such commerce is found in the act, it does not follow that the provisions which are expressed in that act should not be applied and be given their lawful effect. Even therefore if the results of applying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist. *This conclusion follows, since the power of Congress to subject every carrier engaging in interstate commerce to the regulations which it has adopted is undoubted.*

The situation in this respect is similar to that with respect to the power of Congress to regulate bridges

across the navigable waters constructed under the authority of the States. The franchise granted by the State is held subject to the paramount authority of Congress to regulate interstate commerce.

Willamette Iron Bridge Co. v. *Hatch*, 125 U. S., 1.

West Chicago Street Railroad Co. v. *Chicago*, 201 U. S., 506, 524.

Union Bridge Co. v. *United States*, decided February 25, 1907.

IX.

The Act Establishes a Rule of Conduct.

It is said by the learned judges who have held this act unconstitutional that Congress can only impose a liability upon a common carrier engaged in interstate commerce for the violation of a rule of conduct which it has established, and that the present act establishes no such rule.

It is difficult to understand how this contention can be maintained in the face of a statute which makes such carriers liable for their negligence—for the negligence of their officers, servants, and employees is their negligence, as it is only through them that corporations can act. By this act such carriers are admonished that they must be careful and diligent in the conduct of their business and not careless and negligent.

It will be observed that in *Peirce* v. *Van Dusen*,

supra, Mr. Justice Harlan, referring to the employers' liability act of the State of Ohio, said (78 Fed., 698):

> The statute does nothing more than to establish *a rule of action* to be observed by all within the State.

It will also be observed that in *Sherlock* v. *Alling*, above cited, the court was unable to perceive any essential difference between a "regulation" of Congress "touching the liability of parties for marine torts" and the other regulations of navigation and steam vessels therein referred to.

The statute imposes exactly the same rule of conduct upon carriers with respect to employees as is to be imposed by the common law with respect to passengers and strangers.

In *Chicago, Milwaukee, etc., Railway* v. *Solan*, the court, in discussing the nature of the Iowa statute which forbade a carrier from limiting its liability with respect to passengers and property transported, said (169 U. S., 138):

> Its whole object and effect are to make it more sure that railroad companies shall perform the duty resting upon them by virtue of their employment as common carriers, *to use the utmost care and diligence* in the transportation of passengers and goods.

In *Pennsylvania Railroad Co.* v. *Hughes*, the court, after quoting from its opinion in the Solan case, said (191 U. S., 491):

> It is true that this language was used of a statute of Iowa enacting a rule of obligation

for common carriers in that State. But the principle recognized is that in the absence of Congressional legislation upon the subject, a State may require a common carrier, although in the execution of a contract for interstate carriage, to use *great care and diligence* in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties.

We see no difference in the application of the principle based upon the manner in which the State requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the State courts. The State has the right *to promote the welfare and safety* of those within its jurisdiction by requiring common carriers to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding.

X.

Power of Congress to Alter the Common-law Rule as to the Nonsurvivorship of Actions ex delicto.

It is manifest that the power of Congress to regulate the liability of common carriers engaged in interstate commerce for injuries to their employees, which the foregoing decisions fully recognize, includes the power not only to give a right of action to the injured employee but to preserve that right for the benefit of his relations and those dependent on him in the event of his death. Necessarily, if Con-

gress may say that a common carrier engaged in interstate commerce shall be liable for injuries to its employees, it may say to whom it shall be liable. Having jurisdiction over this subject, it may exercise that jurisdiction to the extent that the needs of interstate commerce may seem to demand, either by increasing the liability of the carrier for injuries to its employees or by decreasing such liability.

If it may give a right of action to an injured employee where none theretofore existed; it may, if the protection of interstate commerce seems to require, preserve that right of action for the benefit of those nearly related or dependent on such employee if he dies. It is manifest that the purpose of this statute would be but half accomplished if the right of action given to the injured employees were allowed to abate with their death.

In *Sherlock* v. *Alling* (93 U. S., 99), above referred to, it will be observed that the court was dealing with a statute of Indiana changing the rule as to the non-survivorship of actions *ex delicto*.

In this respect the act of Congress creates no innovation, as such statutes exist in most, if not all, of the States.

XI.

Power of Congress to Alter Rule as to Effect of Contributory Negligence.

There is no question of contributory negligence in this case. But it may not be improper to say a word in regard thereto.

If, as it is submitted has been shown, Congress has the power to regulate the liability of common carriers to their employees for injuries received to them in the course of their employment, whether through the negligence of fellow-servants or by reason of defects in the cars, machinery, and appliances furnished by the carrier, it necessarily has the right to say what shall be the effect of contributory negligence on the part of the injured employee. In other words, if Congress can regulate the subject at all it can regulate it in its entirety. The only arguments which can be made against its power in this latter respect are those which have been refuted as to the other and larger aspect of the matter.

The common-law rule that contributory negligence bars a recovery, like the fellow-servant doctrine, is founded upon the supposed interests of public policy, and it is for Congress to determine in regulating this subject whether public policy requires the modification of both rules.

The rule which Congress has adopted in the present statute is, theoretically at least, ideal. Whether it will prove so as a practical matter must be left to experience to determine. If it should operate harshly or unjustly, the parties concerned must apply to Congress and not to the courts for relief.

The statute simply provides that contributory negligence on the part of an employee shall not bar a recovery where it was slight and that of the employer gross in comparison; but it also provides that the

damages shall be diminished in proportion to the amount of negligence attributable to the employee.

It is manifest that the aim of Congress was to do exact justice.

The wisdom of such a rule as applied to marine torts was recognized in *The Max Morris* (137 U. S., 1.) In that case the Circuit Court found, as a matter of fact, that the libellant, a stevedore employed in loading coal upon the vessel, was injured partly through his own negligence and partly through the negligence of the officers of the vessel. In holding that the libellant was entitled to recover divided damages notwithstanding his own negligence, this court, after referring to some of its previous decisions, said (pp. 14–15):

> All these were cases in admiralty, and were not cases of collision between two vessels. They show an amelioration of the common-law rule and an extension of the admiralty rule in a direction which we think is manifestly just and proper. Contributory negligence in a case like the present should not wholly bar recovery. There would have been no injury to the libelant but for the fault of the vessel; and while, on the one hand, the court ought not to give him full compensation for his injury where he himself was partly in fault, it ought not, on the other hand, to be restrained from saying that the fact of his negligence should not deprive him of all recovery of damages. As stated by the district judge, in his opinion in

> the present case, the more equal distribution of justice, the dictates of humanity, the safety of life and limb, and the public good will be best promoted by holding vessels liable to bear some part of the actual pecuniary loss sustained by the libelant, in a case like the present, where their fault is clear, provided the libelant's fault, though evident, is neither willful nor gross nor inexcusable and where the other circumstances present a strong case for his relief. We think this rule is applicable to all like cases of marine tort founded upon negligence and prosecuted in admiralty as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libelant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery.

The doctrine here announced was applied to *The Mystic* (44 Fed., 399); *The Frank & Willie* (45 Fed., 405, 497); *The Nathan Hale* (48 Fed., 700); *The Julia Fowler* (49 Fed., 279); *The Serapis* (49 Fed., 396, 397); *The J. & J. M'Carthy* (55 Fed., 86); *The Cyprus* (55 Fed., 333); *Wm. Johnson & Co.* v. *Johnson* (86 Fed., 888).

All except the first were cases in which an injured employee, himself at fault, was allowed to recover divided or partial damages for injuries received through the negligence of his employer.

In the case last cited the Circuit Court of Appeals

for the Fifth Circuit, speaking by Judge Pardee, said (86 Fed., 888):

> But finding that the libelant contributed to his own injury does not dispose of this case. *The common-law rules with reference to contributory negligence do not control in admiralty.* In cases of marine tort the admiralty courts, where both parties are at fault, will divide the damages as the circumstances surrounding the tort in question may require. (*The Max Morris*, 137 U. S., 1.)

In Tennessee the rule seems to be that contributory negligence on the part of employees will not bar a recovery, but goes to mitigate the damages. (Labatt on Master and Servant, Vol. II, p. 782, and cases cited.) A like rule as to strangers seems to prevail in Georgia. (Ib., 781.) Ohio has abolished the rule of contributory negligence in the case of violations by common carriers of its safety-appliance laws. (Act of March 19, 1906, Ohio Transportation Laws, 136.)

The following is from the House report hereto appended:

> Section 2 is a modification of the common-law rule of contributory negligence. It does not abolish the law. Under its provisions contributory negligence still bars a recovery for personal injuries or death in all cases except where the contributory negligence of the employee is slight and that of the employer gross in comparison. Nor does this section adhere to the doctrine of comparative negli-

gence, for under the common-law rule of comparative negligence the injured party is entitled to recover all the damages that he suffered, notwithstanding he is guilty of contributory negligence in a slight degree. This section provides that the amount of his recovery shall be diminished in proportion to the negligence attributable to him; that is to say, the plaintiff shall bear the burden of his slight negligence and the defendant the burden of his gross negligence. Each party shall pay the penalty of his own negligent act.

Beach, in his work on Contributory Negligence, page 136, comments on the law as provided in this section as follows:

"Much may be said in favor of the rule which counts the plaintiff's negligence in mitigation of the damages in those cases which frequently arise, wherein, on one hand, a real injury has been suffered by the plaintiff by reason of the culpable negligence of the defendant, and yet where, on the other hand, the plaintiff's conduct was such as to some extent contribute to the injury, but in so small a degree that to impose upon him the entire loss seems not to take a just account of the defendant's negligence. In those cases, which may be denominated 'hard cases,' the Georgia and Tennessee rule in mitigation of damages without necessarily sacrificing the principle upon which the law as to contributory negligence rests is a rule against which, in respect of justice and humanity, nothing can be said. Where the severity of the general rule might refuse the plaintiff any remedy

whatever, as the sheer injustice of the rule, as laid down in *Davis* v. *Mann*, would impose the whole liability upon the defendant, it is quite possible to conceive a case where the application of the rule which mitigates the damages in proportion to the plaintiff's misconduct, but does not decline to impose them at all, would work substantial justice between the parties."

Shearman and Redfield, on the Law of Negligence, fifth edition, page 158, in speaking of this rule, say:

"This is substantially an adoption of the admiralty rule, which is certainly nearer ideal justice, if juries could be trusted to act upon it."

In this act Congress has seen fit to trust juries to act upon this rule. The wisdom of so doing is not, under the decisions, for the determination of the courts.

XII.

Act Limited to Subjects Within the Control of Congress.

The act, in terms, applies only to common carriers "*engaged in trade and commerce* in the District of Columbia, or in any Territory of the United States, or *between the several States*, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations." (Sec. 1.)

More briefly, as stated in its title, it is "An act relating to liability of *common carriers* in the District of Columbia and Territories and common carriers *engaged in commerce between the States* and foreign nations to their employees."

As to the authority of Congress to regulate the liability of common carriers in the District of Columbia and the Territories there can be no question.

Nor, under the decisions heretofore referred to, can there be any real question as to the authority of Congress to regulate the liability of common carriers engaged in interstate or foreign trade or commerce.

Whether a particular carrier is engaged in interstate or foreign commerce within the meaning of the act is a question to be determined as the occasion arises. With respect to those railroads which, like the defendants', extend from one State into another, there can be no question. The declaration alleged, and the demurrer admits, that "the defendants are railroad corporations engaged in interstate trade and commerce."

Interstate railroads are always referred to by the courts as being "engaged" in interstate commerce as will be seen from the opinions in the cases referred to herein.

The act simply seeks to regulate an instrumentality of interstate commerce, which, the authorities show, is necessarily subject to the control of Congress.

The fact that a common carrier engaged in interstate commerce may also be doing a local business

by the same means and agencies can not defeat the power of Congress to regulate such carrier as an instrumentality of interstate commerce. The regulation of State commerce which may result in such a case is manifestly only indirect and incidental to the constitutional object which Congress had in view, namely, the regulation of interstate commerce.

It has been shown that the States, in the exercise of their police powers, may enact legislation of the kind here in question, although it may incidentally affect interstate commerce. By a parity of reasoning, Congress, in the exercise of its authority to regulate interstate commerce, may enact such legislation, although it incidentally affects State commerce.

It is important to bear in mind that there is an essential difference between the power of Congress over an article or commodity which ceases to be a subject or interstate commerce the moment its interstate transportation ceases, and the instrumentality by which such commodity may be transported.

This distinction was pointed out by this court in the Johnson case, above cited, where the court said (196 U. S., 22):

> Counsel urges that the character of the dining car at the time and place of the injury was local only and could not be changed until the car was actually engaged in interstate movement or being put into a train for such use, and *Coe* v. *Errol* (116 U. S., 517) is cited as supporting that contention. In *Coe* v. *Errol* it was held that certain logs cut in New

Hampshire, and hauled to a river in order that they might be transported to Maine, were subject to taxation in the former State before transportation had begun.

The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different States, renders this and like cases inapplicable.

Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law.

In *Voelker* v. *Chicago, M. & St. P. Rwy. Co.* (116 Fed., 867), the Circuit Court, Northern District of Iowa, held that the safety-appliance act of March 2, 1893, applied to a car designed for interstate traffic, though at the time being hauled empty. On appeal, the Circuit Court of Appeals for the Eighth Circuit, having in view both the act of Congress and a similar act of the State of Iowa, said (129 Fed., 522, 528–529):

Defendant was clearly shown to be a common carrier *engaged* in interstate commerce by railroad and to be using the car mentioned on its line of railroad in moving interstate traffic, and therefore the branch of the case relating to the condition of the coupler is controlled by

> the act of Congress and not by the State statute. Plaintiff's petition states clearly enough that defendant was a common carrier *engaged* in commerce by railroad, and that it was using its car on its line of railroad in moving traffic. As stated, the case falls short of coming within the act of Congress only in that the petition does not allege the interstate character of the commerce in which defendant was engaged or of the traffic which the car was moving.

The court then goes on to say, however, that the evidence introduced showed the interstate character of the commerce in which the defendant was engaged and of the traffic being moved by the car.

It is to be observed that the safety-appliance act of March 2, 1893, which was under consideration in the Johnson case and that last cited only made it unlawful for "any common carrier *engaged* in interstate commerce by railroad" to haul or permit to be used on its line any car "used in moving interstate traffic" not equipped with automatic couplers. But by the amendatory act of March 2, 1903 (32 Stat., 943), Congress provided that the provisions of the original act should be held to apply to "all trains, locomotives, tenders, cars, and similar vehicles used on any railroad *engaged* in interstate commerce."

In *United States* v. *Great Northern Railway Co.* (145 Fed., 438) the District Court, Eastern District of Washington, held that the act, as so amended, applied to all cars regularly used on any railroad engaged in interstate commerce, not only while actually

in use in such commerce, but at all times when in use on such road. The court said:

> The allegations of the sixth cause of action are that the defendant used on its line of railroad in Hillyard, in the State of Washington, a locomotive engine in moving a car containing interstate traffic, consigned from St. Cloud, in the State of Minnesota, to Hillyard, in the State of Washington, when the coupling and uncoupling apparatus of the locomotive was out of repair and inoperative. The sufficiency of these allegations is challenged upon the sole ground that it does not affirmatively appear that the cars and locomotive were being used in interstate traffic, for the reason that reliance must be made upon the allegations that they were used only in the State of Washington. Having reference to the constitutional powers of Congress, the argument is that a common carrier is not affected by the legislation which the plaintiff would invoke, because it does not apply to traffic within the States.
>
> The title of the act of 1893 fully reflects the legislative intent as expressed in the act, and it is manifest that the purpose in view was the regulation of commerce between the States by requiring common carriers to conform to certain requirements regarded as essential to the safety of employees and passengers. *To sustain the demurrer would be to hold that it is beyond the power of Congress to control the instrumentalities through which interstate commerce may be carried on.* But the prerogative necessarily carries with it the authority to prescribe the rules and regulations which shall

> apply to those engaged in it. Illustrations of the futility of any effort on the part of Congress to exercise its constitutional powers in this regard, if the contention made by the defendant can be sustained, are not far to seek. An interstate carrier might haul traffic from one State to another, there transfer it, and from thence transport it, without any of the safety appliances provided by law. If it be answered that this would be an evasion of the law, the result is susceptible of further illustration. Cars containing State traffic could be commingled with those containing interstate traffic, and thus defeat the purposes of the legislation upon the subject. The effect of this would be to endanger the train engaged in interstate traffic. Again, a carrier could use trains engaged entirely in State traffic upon its lines without the requisite equipment, which might result in injury to passengers by coming in collision with a train engaged in interstate traffic. It is the carrier which the acts seek to regulate, and it is by this method that Congress has undertaken to bring the matter under control.

In *United States* v. *Baltimore and Ohio Southwestern Railroad* (District Court, Southern District of Illinois, January term, 1905) the Government sued to recover a penalty of $100 alleged to have been incurred by the defendant in the use of a train without the percentage of air brakes required by the safety-appliance act. The petition did not allege that the train was used in moving interstate traffic. The defendant demurred on that ground,

and also contended that the amended act was unconstitutional. Judge Humphrey overruled the demurrer, but filed no opinion in the case.

It is not contended that Congress can regulate the exclusively local business in which a common carrier may be engaged. Thus it is conceivable that a railroad company operating an interstate road may also be operating a purely local line. The act of Congress would not apply to such a line, because, in respect thereto, the railroad company would not be a common carrier engaged in interstate commerce. The act would no more apply to a purely local line of the company than to any other business—the mining of coal, for instance—in which it might be engaged.

It is said that the act falls within the rule announced in the Trade-Mark Cases (100 U. S., 82). But a careful analysis of the decision in those cases will show that the condition here presented is plainly dissimilar.

In the Trade-Mark Cases the court was considering a law passed by Congress upon the manifest assumption that the whole subject of trade-marks was a matter of national control, under the power vested in Congress by the Constitution to "promote the progress of science and useful arts by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." Resort to the commerce clause of the Constitution was only had when it became evident that, as the court held in that case, trade-marks were not included within

the grant of power just mentioned. But as an exercise of the commerce power, the act could only be sustained in respect to interstate or foreign commerce, and it was not limited to such commerce. Therefore it was held invalid.

After stating that "a due respect for a coordinate branch of the Government requires that it shall decide that it has transcended its powers only when that is so plain that we can not avoid the duty," and referring, in support of this principle, to the few instances in which, despite the vast amount of argument presented to them, acts had been declared unconstitutional, the court said:

> Governed by this view of our duty, we proceed to remark that a glance at the commerce clause of the Constitution discloses at once what has been often the subject of comment in this court and out of it, that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes. While bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest which, being trade or traffic between citizens of the same State, is beyond the control of Congress.

> When, therefore, Congress undertakes to enact a law which can only be valid as a regulation of commerce, *it is reasonable to expect to find on the face of the law, or from its essential nature,* that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its *main* purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce *wholly* between citizens of the same State, it is obviously the exercise of a power not confided to Congress.

The present statute discloses on its face that it is intended as a regulation of interstate and foreign commerce, being expressly confined to common carriers engaged in such commerce. The "main purpose" of the act is not "to establish a regulation applicable to all trade, to commerce at all points," but simply to regulate an instrumentality of interstate commerce. It is not "designed to govern commerce wholly between citizens of the same State," but simply to protect interstate commerce. Local commerce, if affected at all, is affected only indirectly and incidentally. That such commerce was not intended to be directly regulated appears from the report of the House committee, who said:

> A Federal statute of this character will supplant the numerous State statutes on the subject *so far as they relate to interstate commerce.*

If the act applied to all common carriers, irrespective of the character of commerce in which they might be engaged, it would come within the rule announced in the Trade-Mark Cases. But being expressly confined to an instrumentality of interstate commerce over which, under the authorities cited, Congress has paramount and exclusive control whenever it chooses to exercise its power, the act is clearly valid and constitutional.

It will be observed that from *Gibbons* v. *Ogden* down the limitation upon the commerce power of Congress has been placed at the "purely" or "exclusively" local commerce of the States. It has never been held that Congress was divested of control over the instrumentalities of interstate commerce simply because local commerce might incidentally be affected by its regulations.

In *Interstate Commerce Commission* v. *Baird* (194 U. S., 25) the court held that the railroads there referred to—Lehigh Valley Railroad Company, Central Railroad Company of New Jersey, Delaware Lackawanna and Western Railroad Company, and the Philadelphia and Reading Railway Company—could be compelled to produce before the Interstate Commerce Commission certain contracts which they had made for the purchase of coal in Pennsylvania. The court said (p. 41):

> While the contracts were produced for inspection, the witnesses refused to permit them to be given in evidence. The Circuit Court held them to be irrelevant upon the ground that they related solely to an inter-

> state [intrastate] transaction—the sale of coal in Pennsylvania—and had nothing to do with interstate commerce. It appears that the railroads proceeded against in the complaint are *engaged* in carrying coal from the anthracite coal regions to tidewater. The contracts are between certain coal companies and independent operators engaged in mining coal in that region. * * *
>
> The railroads are all *engaged* in interstate commerce, and into their affairs and methods of doing business the Commission might be, and is, lawfully authorized by the commerce act to make investigation.

In the "Beef Trust case" (*Swift & Co.* v. *United States*, 196 U. S., 375) it was alleged by the United States that Swift & Co. were members of a combination engaged in the restraint and monopoly of interstate trade, contrary to the antitrust act of July 2, 1890. The court held that a combination of dealers in live stock and its products throughout the United States to regulate prices, to restrict shipments, to establish uniform rules of credit, and to get less than lawful rates from railroads to the exclusion of competitors, with the intent to monopolize commerce among the States, was within the meaning of the law, and hence unlawful. The court said:

> Although the combination alleged embraces restraint and monopoly of trade within a single State, its effect upon commerce among the States is not accidental, secondary, remote, or merely probable. On the allegations of the

bill, the latter commerce no less, perhaps even more than commerce within a single State, is an object of attack.

The extent to which Congress, in the exercise of its power to regulate interstate commerce, may incidentally control local traffic is further illustrated by the case of *New York, New Haven and Hartford Railway* v. *Interstate Commerce Commission* (200 U. S., 361), above cited, where it was held that Congress could, if necessary for the protection of interstate commerce, forbid a railroad engaged in such commerce from dealing in any other business.

Whether the act would apply to an employee of a railroad engaged in interstate commerce whose duties related exclusively to local traffic, assuming there are any such employees, it seems unnecessary to consider in this case, as the injured employee here referred to was employed upon an interstate train. This question does not, we think, affect the constitutionality of the statute. It is simply a question of the application of the statute to a particular case. It may be doubted, however, whether as a practical matter there is any such strict separation of the duties of employees of interstate carriers.

That it would be within the power of Congress to regulate the liability of common carriers engaged in interstate commerce to all their employees upon their interstate lines, irrespective of whether such employees were handling local or interstate traffic, can not be doubted. The safety of interstate commerce may depend as much upon the safety of employees han-

dling local traffic upon the lines of such a carrier as upon the safety of those handling interstate traffic. An interstate road, let it be assumed, runs both local and interstate trains upon its lines. Manifestly, interstate trains can not be adequately protected unless Congress can control such local trains, as there is just as much danger of an interstate train colliding with a local train running upon the same track as with another interstate train. And so, in the act of 1903 amending the safety-appliance statute, Congress extended its provisions requiring the use of continuous brakes, automatic couplers, etc., to all trains, locomotives, cars, etc., used on any railroad engaged in interstate commerce. For the same reason it is important that Congress should be able to regulate the liability of a common carrier engaged in interstate commerce to all persons employed by it as such carrier, irrespective of the kind of traffic they may be engaged in handling.

The fact that every person employed by an interstate carrier necessarily must use, even in handling purely local traffic, the means and agencies employed in handling interstate traffic gives Congress the right to control his relations to such carrier. Thus, although a train and its crew upon the lines of an interstate railroad may be used in hauling exclusively local traffic, yet, in order to do so, it must use the same track, switches, sheds, etc., used by interstate trains, and the adequate protection of interstate trains would necessarily require that Congress be able to exercise control over all trains and their crews running upon its lines.

It is evident, from the joint resolution of Congress of June 30, 1906 (34 Stat., 838), directing the Interstate Commerce Commission to report on the use and necessity for block-signal systems for the control of railway trains in the United States, that Congress has under consideration the advisability of establishing such a system for railroads engaged in interstate commerce, yet it is manifest that no adequate system could be established unless Congress had power to control all trains—local and interstate—running upon the lines of such carriers.

Necessarily, therefore, as held in *New York, New Haven and Hartford R. R. Co.* v. *Interstate Commerce Commission* (200 U. S., 361), Congress has the power "to subject every carrier engaging in interstate commerce to regulations which it has adopted," or may adopt, for the protection of interstate commerce or to advance the interests of those concerned therein, even though such regulations may affect the local business of the carrier. By engaging in interstate commerce the carrier chooses to subject itself and its business to the control of Congress, and can not be heard to complain of such regulations.

It is the *carrier* and not its employees that the act seeks to regulate, and the carrier is subject to such regulations because it is engaged in interstate commerce. It is submitted that Congress can make a common carrier engaged in interstate commerce liable to *anyone* for its negligence who is affected by it; and if it can do that, necessarily it can make such carrier liable to all of its employees.

But whether Congress has exercised its power in this respect is another question. On its face this statute relates only to interstate commerce. It seeks only to regulate the liability of a common carrier engaged in such commerce to its employees—that is, the persons employed by it for the purpose of carrying on its business, and the only business referred to is trade and commerce between the several States. It is a remedial statute and should therefore be liberally construed so as to accomplish the end in view—the observance of due care and diligence in the conduct of the common carrier toward its employees so as to enhance the safety of interstate transportation to all concerned therein. But if to *construe* the statute to extend to employees of such carrier not engaged in or connected with the interstate business of the carrier would render the statute unconstitutional, such construction manifestly ought to be rejected.

To say that a statute should not be construed so as to render it unconstitutional when a constitutional construction is open to the court hardly needs to be argued. The case is very different from that presented in the Trade-Mark and other like cases (*United States* v. *Reese*, 92 U. S., 214; *United States* v. *Harris*, 106 U. S., 629; *Baldwin* v. *Franks*, 120 U. S., 678; *James* v. *Bowman*, 190 U. S., 127), because the statutes there involved were, on their face, plain attempts to regulate matters beyond the control of Congress.

Moreover, the statutes referred to in those cases were penal statutes. Such was also the situation with respect to the regulation of the Secretary of the Inte-

rior involved in *Illinois Central R. R.* v. *McKendree*, recently decided (203 U. S., 514). Where, as here, Congress enacts a statute of a civil and remedial nature, it would be absurd to say that because it might be construed to apply to something not within its control it should be held unconstitutional.

In *McCullough* v. *Virginia* (172 U. S., 102) the court, speaking by Mr. Justice Brewer, said (p. 112):

> It is elementary that every statute is to be read in the light of the Constitution. However broad and general its language it can not be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach. * * * So, although general language was introduced into the statute of 1871, it is not to be read as reaching matters in respect to which the legislature had no constitutional power, but only as to those matters within its control. And if there were, as it seems there were, certain special taxes and dues which under the existing provisions of the State constitution could not be affected by legislative action, the statute is to be read as though it in terms excluded them from its operation.

In *Packet Co.* v. *Keokuk* (95 U. S., 80), the court sustained a municipal ordinance broad enough in its terms to include matters beyond the constitutional control of the city or State. Referring to this case in *Baldwin* v. *Franks*, the court (120 U. S., 688) said:

> In *Packet Co.* v. *Keokuk* the question arose upon an ordinance of the city of Keokuk establishing a wharf on the Mississippi River and

the rates of wharfage to be paid for its use. In its general scope the ordinance was broad enough to include a part of the shore of the river declared to be a wharf, which was in its natural condition and unimproved. The city had, however, actually built, paved, and improved a wharf at a large expense within the limits of the ordinance, and the charges then in question were for the use of the facilities thus provided for receiving and discharging cargoes. An objection was made to the validity of the ordinance, because it provided for charges to be made for the use of the unimproved bank as well as for the improved wharves, but the court said (p. 89): "The ordinance of Keokuk has imposed no charge upon these plaintiffs which it was beyond the power of the city to impose. To the extent to which they are effected by it there is no valid objection to it. Statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable. We think a severance is possible in this case. It may be conceded that the ordinance is too broad and that some of its provisions are unwarranted. When those provisions are attempted to be enforced a different question may be presented." *That was not a penal statute, but only a city ordinance regulating wharfage, and the suit was civil in its nature.* The only question was whether the packet company was bound to pay for the use of improved wharves when the ordinance, taken in its breadth, fixed the charges and required payment for the use of that part of the established

> wharf which was unimproved as well as that which was improved. The precise point to be determined was whether, under those circumstances, the vessel owners were excused from paying for the use of that which was improved.

So, in *Tiernan* v. *Rinker* (102 U. S., 123), the court held a statute of Texas taxing intoxicating liquors to be inoperative only so far as it discriminated against imported wines or liquors, and refused an injunction because the defendant was also engaged in selling other liquors which were held subject to the tax.

In *In re Rahrer* (140 U. S., 545, 563) the court, speaking by Mr. Chief Justice Fuller, held that a statute of Iowa, relating to the sale of intoxicating liquors, which had been construed by the Supreme Court of the State to extend to liquor in the original package in which it was imported and which had been held unconstitutional in that respect in *Leisy* v. *Hardin* (135 U. S., 100), was not thereby rendered unconstitutional as to matters within the jurisdiction of the State.

Nor does the fact that the act extends to all employees of common carriers engaged in interstate and foreign commerce, irrespective of the danger of their particular employments, vitiate it. As has been shown the business of common carriers forms a proper basis of classification and special legislation. It is not necessary for the legislature to go further and differentiate between the different classes of employees of such carriers according to the degree

of danger to which they may be subjected, although possibly it may do so. As is well known, there is every variety of risk in the conduct of such carriers. The danger to men employed on railroad trains is greater than that of switchmen and yardmen; the hazard of the latter greater than that of telegraph operators, freight handlers, etc. But it is not necessary to provide a different rule for each case. As this court has said, in the cases above referred to, "the power of the legislature to distinguish, select, and classify objects of legislation necessarily had a wide range of discretion," and it is "sufficient to satisfy the demands of the Constitution if the classification were practical and not palpably arbitrary." (*Tullis* v. *Lake Erie and Western Railroad*, 175 U. S., 352-353, referring to *Orient Insurance Co.* v. *Daggs*, 172 U. S., 557.) The law is equitable in that where the danger is less the liability will less frequently arise, and if there practically be no danger at all there will be practically no liability. But were it otherwise, the injustice or harshness of the rule would be no just cause for declaring it invalid. In that case, as has been often held, the remedy lies not with the courts but with the legislature.

If necessary, under the doctrine of the *Church of the Holy Trinity* v. *United States* (143 U. S., 457), the general language of the statute might be restricted to those employees of common carriers engaged in interstate commerce whose business is of a hazardous nature, as it was the dangers of transportation which were intended to be remedied.

In *Jones* v. *Guaranty and Indemnity Co.* (101 U. S., 626) the court said:

> A thing may be within a statute and not within its letter, or within the letter and not within the statute. The intent of the law maker is the law.

These, however, are all matters relating to the application of the statute to particular cases, and do not, it is submitted, affect its constitutionality.

The act in question has recently been held to be constitutional by several Federal courts:

Plummer v. *Northern Pacific Railway Co.*, Circuit Court, Western District of Washington, Hanford, J., decided March 2, 1907.

Spain v. *St. Louis & San Francisco Railroad Co.*, District Court, Eastern District of Arkansas, Trieber, J., decided March 13, 1907.

Kelley v. *Great Northern Railway Co.*, Circuit Court, District of Minnesota, Morris, J., decided March —, 1907.

Snead v. *Central Georgia Railway Co.*, Circuit Court, Southern District of Georgia, Eastern Division, Speer, J., decided March 25, 1907.

These decisions are not yet reported, but correct copies will be furnished the court.

It is respectfully submitted that the act of Congress of June 11, 1906, is constitutional.

CHARLES J. BONAPARTE,
Attorney-General.

WILLIAM R. HARR,
Special Assistant to the Attorney-General.

59TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 2335.

LIABILITY OF EMPLOYERS.

MARCH 15, 1906.—Referred to the House Calendar and ordered to be printed.

Mr. STERLING, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. R. 239.]

The Committee on the Judiciary, to whom was referred House bill 239, have had the same under consideration, and report it to the House with certain amendments and recommend its passage when so amended.

Amend by striking out the word "heirs" in line 10, page 1, and the words "at law" in line 11, page 1, and insert after the word "his" in line 10, page 1, the following: "personal representatives, for the benefit of his widow and children, if any, if none, to his next of kin dependent upon him."

Amend further by striking out the words "or mismanagement" in line 12, page 1.

Amend further by inserting after the word "insufficiency" in line 13, page 1, the following: "due to its negligence."

Amend further by inserting after the word "slight" in line 6, page 2, the following: "and that of the employer was gross."

Amend further by striking out in line 7, page 2, the words, "to that of the employer."

Amend further by inserting after the word "comparison" in line 7, page 2, the following: "but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

Amend further by inserting as section 4 the following:

SEC. 4. That no action shall be maintained under this act unless commenced within two years from the time the cause of the action accrued.

Amend further by striking out figure 4 and inserting figure 5 in lieu after the word "Sec." in line 20, page 2.

The bill relates to common carriers by railroad in the Territories and the District of Columbia and to those engaged in interstate commerce. The scope of it is expressed in substantially the same language as that used in the act to amend the safety-appliance act approved March 2, 1903.

The purpose of the bill is to change the common-law liability of employers of labor in this line of employment for personal injuries received by employees in the service. It relaxes the strict common-law rule of liability which bars a recovery of damages for the personal injury or death of an employee occasioned by the negligence of a fellow-servant, and also that common-law rule which makes contributory negligence a defense to claims for such injuries, however slight such negligence may be on the part of the plaintiff and however gross on on the part of the defendant. It permits a recovery by an employee for an injury caused by the negligence of a coemployee; nor is such a recovery barred even though the injured one contributed by his own negligence to the injury, provided his negligence is slight and that of the coemployee is gross in comparison. The amount of recovery, however, is diminished in the same degree that the negligence of the injured one contributed to the injury. It makes both parties responsible for their own negligence. It also renders void any contract intended to restrict the liability of the employer for the negligence of the employee.

Many of the States have already changed the common-law rule in this particular, and by this bill it is sought to fix a uniform rule of liability throughout the Union with reference to common carriers engaged in this line of employment.

SECTION 1.

Section 1 of this bill provides that common carriers by railroad engaged in interstate commerce in the District of Columbia, the Territories, and between the several States shall be liable to its employees for all damages resulting from its negligence or by reason of any defect or insufficiency due to its negligence in its road, equipment, or methods. It abolishes the common-law doctrine of fellow-servant. It is not a new departure, but rather goes back to the old rule which made the master liable for the negligence of his servant, either to a coservant or to a third person.

The doctrine of fellow-servant was first enunciated in England in 1837, and since that time it has been generally followed in that country and this, except where abrogated or modified by statute. Whatever reason may have existed for the doctrine at the time it was first announced, can not be said to exist now under modern methods of commerce by railroad. The rule still prevails in many of the States, and without any apparent good reason. In recent years many of the countries of Europe have adopted new rules of liability, which greatly relieve the harshness of the doctrine, as it still prevails in some of the American States.

ENGLAND.

In 1888 England passed an act which abolished the doctrine of fellow-servant with reference to the operation of railroad trains, and in 1897 it extended this law to apply to many of the hazardous employments of the country.

GERMANY.

For many years the doctrine in Germany has been yielding step by step to better rules, until for the last quarter of a century it does not apply to any of the hazardous occupations.

AUSTRIA.

In 1869 Austria passed a law making railroad companies liable for all injuries to their employees except where the injury was due to the victim's own negligence.

FRANCE.

The Code Napoleon made the employer answerable for all injuries received by his workmen, and this code is still in force in Belgium and Holland.

Other European countries have from time to time made laws fixing the liability of the master for damages caused by the negligent act of his servant.

UNITED STATES.

Many of the States have passed laws modifying the doctrine as changing conditions required it and justice to the employee demanded it.

Alabama in 1885 eliminated the doctrine so far as it relates to railroads and in other particulars.

Arkansas in 1893 qualified the doctrine as to railroad employment.

Georgia in 1856 entirely abolished the doctrine as to railroads.

Iowa abolished it as to train operatives in 1862.

Kansas did the same thing in 1874.

The latest statute in Wisconsin on the subject abolished the fellow-servant doctrine as to employees actually engaged in operating trains.

Minnesota did the same thing in 1887.

Florida, Ohio, Mississippi, and Texas have changed the doctrine to the advantage of the employee.

North Carolina, North Dakota, and Massachusetts have practically eliminated the doctrine as regards the operation of railroad trains.

Colorado in 1901 abolished the doctrine in toto.

Other States have either abolished or modified it as regards the operation of railroads.

As compared with the law now in force in other countries and in many of the States, the changes made in the law of fellow-servant by this bill are are not radical. The doctrine as regards the hazardous occupations is being relegated everywhere.

A Federal statute of this character will supplant the numerous State statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries instead of being subject to numoerus rules will be fixed by one rule in all the States.

It is thought that the adoption of the rule, as provided in this section, will be conducive to greater care in the operation of railroads. As it is now, where the doctrine of fellow-servant is in force no one is responsible for the injury or death of a fellow-servant. The coservant who is guilty of negligence resulting in the injury may be liable, but as a rule he is not responsible, and hence the injury is not compensated. The employee is not held by the employer to such strict rules of caution for the safety of his coemployee, because the employer is not bound to pay the damages in case of injury. If he were held liable for damages for every injury occasioned by the negligence of his servant he would impose the same strict rules for the safety of his employees as he does for the safety of passengers and strangers. He

will make the employment of his servant and his retention in the service dependent upon the exercise of higher care, and this will be the stronger inducement to the employee to act with a higher regard for the safety of his fellow-workmen.

SECTION 2.

Section 2 is a modification of the common-law rule of contributory negligence. It does not abolish the law. Under its provisions contributory negligence still bars a recovery for personal injuries or death in all cases except where the contributory negligence of the employee is slight and that of the employer gross in comparison. Nor does this section adhere to the doctrine of comparative negligence, for under the common-law rule of comparative negligence the injured party is entitled to recover all the damages that he suffered, notwithstanding he is guilty of contributory negligence in a slight degree. This section provides that the amount of his recovery shall be diminished in proportion to the negligence attributable to him; that is to say, the plaintiff shall bear the burden of his slight negligence and the defendant the burden of his gross negligence. Each party shall pay the penalty of his own negligent act.

Beach, in his work on Contributory Negligence, page 136, comments on the law as provided in this section as follows:

> Much may be said in favor of the rule which counts the plaintiff's negligence in mitigation of the damages in those cases which frequently arise, wherein, on one hand, a real injury has been suffered by the plaintiff, by reason of the culpable negligence of the defendant, and yet, where, on the other hand, the plaintiff's conduct was such as to some extent contribute to the injury, but in so small a degree that to impose upon him the entire loss seems not to take a just account of the defendant's negligence. In those cases, which may be denominated "hard cases," the Georgia and Tennessee rule in mitigation of damages without necessarily sacrificing the principle upon which the law as to contributory negligence rests is a rule against which, in respect of justice and humanity, nothing can be said. Where the severity of the general rule might refuse the plaintiff any remedy whatever, as the sheer injustice of the rule, as laid down in Davis *v.* Mann, would impose the whole liability upon the defendant, it is quite possible to conceive a case where the application of the rule which mitigates the damages in proportion to the plaintiff's misconduct, but does not decline to impose them at all, would work substantial justice between the parties.

Shearman and Redfield on the Law of Negligence, fifth edition, page 158, in speaking of this rule, say:

> This is substantially an adoption of the admiralty rule, which is certainly nearer ideal justice, if juries could be trusted to act upon it.

The United States has adhered much closer to the common-law doctrine of contributory negligence than the leading countries of Europe. The laws of England, Germany, and Italy go much further to discharge the employee from the responsibility of his own act than does the common-law doctrine of comparative negligence.

The laws of France, Switzerland, and Russia are in practical accord with the provisions of section 2 of this bill.

The rule provided for in this section is recognized to some extent in this country. Maryland and some of the other States have passed statutes seeking to divide the responsibility where both parties are guilty of negligence.

The provisions of this section are certainly just. What can be more fair than that each party shall suffer the consequences of his own care-

lessness? It certainly appeals more strongly to the fair mind than the proposition that the employee shall have no redress whatever, even though his negligence is only slight and that of the employer is gross in comparison.

SECTION 3.

The purpose of section 3 of the bill is to render void any contract of employment, insurance, relief benefit, or indemnity which is made for the purpose of relieving the employer of any liability for damages to an employee for personal injuries arising out of the negligence of a coemployee. This is necessary in order to make effective sections 1 and 2. Many of the railroads of the country insist on their employees making contracts discharging the company from liability for personal injuries.

In any event, the employees of many of the common carriers of the country are to-day working under a contract of employment which by its terms releases the company from liability for damages arising out of the negligence of other employees. As an illustration we quote one paragraph from a blank form of application for a situation with the American Express Company, and entitled "Rules governing employment by this company:"

I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said company, or any of its members, officers, agents, or employees, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands, and causes of action arising out of such injury or connected therewith or resulting therefrom; and I hereby bind myself, my heirs, executors, and administrators with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

Many of the States have enacted statutes making such contracts void, but the United States Supreme Court, there being no Federal statute on the subject, have held a similar contract valid in the case of Voigt *v.* B. & O. S. W. R. R. (176 U. S., p. 498.) In this case the railroad company entered into a contract with an express company whereby it agreed to carry the business of the express company, to furnish it with cars and certain facilities over its road, and to carry its messengers, in consideration of which the express company agreed to save harmless the railroad company from all claim for damages for personal injury received by its employees, whether the injuries were caused by the negligence of the railroad company or otherwise.

Voigt entered the service of the express company as messenger, and by the contract of his employment he agreed to assume all the risk of accident and injury and to indemnify and save harmless the express company from all claims that might be made against it for injury he might suffer, whether resulting from negligence or otherwise, and to execute a release for the same.

Voigt was injured and sued. The court said:

He was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger; and that such a contract did not contravene public policy.

In the case of O'Brien *v.* C. & N. W. Ry. Co. (Fed. Rep., vol. 116, p. 502), which involved the statute of Iowa, making such contracts invalid, the court said:

> That while such contracts would be effective to protect the railroad company from liability at common law under such statutory provisions, declaratory of the public policy of the State, they were invalid, and constituted no defense to an action against it for the death of the messenger occurring in the State of Iowa by reason of the wrecking of the express car in which he was employed, through the negligence and want of ordinary care of defendant or its servants, whether the messenger be regarded as an employee of the defendant or not.

This section of the bill, however, provides that the common carrier may set off against any claim for damages, whatever it has contributed toward such insurance, relief, benefit, or indemnity that may have been paid to the injured employee, which would seem to be entirely fair and all that ought to be required of the employee.

Some of the roads of the country have established what is called relief departments, which seek to operate a species of insurance for the employee against the hazards of the employment, but, so far as we know, all their forms of contracts, used by these relief departments to insure the employee, discharge the company from every possible liability for personal injuries to the employee. This release is made by its terms of agreement, in consideration of the contributions of the company to the relief fund.

The following is one of the paragraphs from the form of application for membership in the relief department used by the Baltimore and Ohio Railroad Company:

> I further agree that, in consideration of the contributions of said company to the relief department and of the guaranty by it of the payment of the benefits aforesaid, the acceptance of benefits from such relief feature for the injury or death shall operate as a release of all claims against said company or any company owning or operating its branches or divisions or any company over whose railroad, right of way, or property the said Baltimore and Ohio Railroad Company or any company owning or operating its branches or divisions shall have the right to run or operate its engines or cars or send its employees in the performance of their duty, for damages by reason of such injury or death which could be made by or through me; and that the superintendent may require, as a condition precedent to the payment of such benefits, that all acts by him deemed appropriate or necessary to effect the full release and discharge of the said companies from all such claims be done by those who might bring suit for damages by reason of such injury or death; and also that the bringing of such a suit by me, my beneficiary or legal representative, or for the use of my beneficiary alone or with others, or the payment by any of the companies aforesaid of damages for such injury or death recovered in any suit or determined by a compromise or any costs incurred therein, shall operate as a release in full to the relief department of all claims by reason of membership therein.

The form of application used by other companies are similar in terms to the one cited, and make acceptance of benefits from said fund a release of all claims for damages for injury or death.

By an act concerning common carriers engaged in interstate commerce and their employees, approved June 1, 1898, known as the arbitration law, it is made a misdemeanor on the part of any employer subject to the provisions of that act—

> To require any employee or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employee or applicant for employment shall agree to contribute to any fund for charitable, sociable, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of benefit arising from the employer's contribution to such fund.

We annex hereto, for the sake of convenience, a copy of the bill as amended by the committee:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employees, or, in case of his death, to his personal representative, for the benefit of his widow and children, if any, if none, for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

SEC. 2. That in all actions hereafter brought against any such common carrier by railroad to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

SEC. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: *Provided, however*, That upon the trial of such action against any such common carrier by railroad the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his heirs at law.

SEC. 4. No action shall be maintained under this act unless commenced within two years from the time the cause of action accrued.

SEC. 5. That nothing in this act shall be held to limit the duty of common carriers by railroad or impair the rights of their employees under the safety-appliance act of March first, eighteen hundred and ninety-six, amended March second, nineteen hundred and three.

Calendar No., 3686.

59TH CONGRESS, 1st Session. | SENATE. | REPORT No. 3639.

LIABILITY OF EMPLOYERS.

MAY 18, 1906.—Ordered to be printed.

Mr. MCLAURIN, from the Committee on Interstate Commerce, submitted the following

REPORT.

[To accompany H. R. 239.]

The Committee on Interstate Commerce, to whom was referred House bill 239, have had the same under consideration and report it to the Senate with the following amendments:

Strike out the words "by railroad" on page 1, line 3.

Insert after the word "employees" on page 2, line 1, the following: "In authority over him or engaged in a different kind of work."

Strike out the word "such" on page 2, line 6.

Strike out the words "by railroad" on page 2, line 6.

Strike out the word "such" on page 2, line 21.

Strike out the words "by railroad" on page 2, line 21.

Strike out the words "heirs at law" on page 2, line 25, and insert in lieu thereof the words "personal representatives."

Strike out the word "two" on page 3, line 2, and insert in lieu thereof the word "one."

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CONSTITUTIONALITY OF THE EMPLOYERS' LIABILITY ACT.

In the District Court for the Eastern District of Arkansas.

HENRY SPAIN *v.* ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY.

Armstrong & Gravette, and J. T. Coston, for plaintiff.
W. J. Orr, for defendant.

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1. The presumption that statutes are constitutional will be indulged in until the contrary is clearly shown.
2. Congress has the power, under the commerce clause of the Constitution, to legislate for the safety and protection of employees engaged in interstate commerce, whether the transportation be on water or on land.
3. It is within the power of Congress, under the commerce clause, to regulate the liability of a common carrier to its employees for personal injuries received while engaged in interstate transportation.
4. The act of Congress of June 11, 1906, relating to the liability of common carriers engaged in commerce between the States to their employees, as stated in its title, commonly called the "Federal employers' liability act," is a regulation of interstate commerce, and is within the constitutional power of Congress to regulate commerce.
5. The Federal employers' liability act is not void because, as alleged, it applies equally to intrastate and interstate commerce, as its provisions are separable so as to be valid when invoked by an employee engaged on a train actually employed in interstate traffic. The title of the act, which is the best summary of its purpose, removes any ambiguity that may be in the text.
6. The Federal employers' liability act is remedial and not penal, which fact takes it out of the rule laid down in the Trade-Mark cases. (100 U. S., 82, and other cases.)
7. The plaintiff in this case, who alleges that he was engaged at the time of the accident on a train engaged in interstate commerce, is within the rule of law that courts will not listen to an objection of unconstitutionality of an act by a party whose right it does not affect in the particular case on trial.

(Decided March 13, 1907.)

TRIEBER, *Judge:*

The constitutionality of the act is attacked upon two grounds: First, that Congress has no power to create and enforce liabilities growing out of the employment of servants by carriers, even if those

carriers be engaged in interstate commerce; and second, if it has such power, the language of the act is so general as to include intrastate commerce, and both are so inseparably connected as to make the whole act unconstitutional.

In passing upon the constitutionality of an act the courts are governed by certain well-settled rules. Statutes are always presumed to be constitutional, and this presumption will be indulged in until the contrary is clearly shown; statutes will be so construed, so far as it is possible to do so, that they shall harmonize with the Constitution, to the end that they may be sustained. On the other hand, if the statute is clearly unconstitutional, the duty of the court is to so declare.

I.

The power to regulate commerce among the several States is granted to Congress by the Constitution in terms as absolute as is the power to regulate commerce with foreign nations. (Brown *v.* Houston, 114 U. S., 627, 630; Bowman *v.* Railway Co., 125 U. S., 465, 482; Crutcher *v.* Kentucky, 141 U. S., 47, 58; Pittsburg Coal Co. *v.* Bates, 156 U. S., 477, 578.)

> Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted. (Hopkins *v.* United States, 171 U. S., 578, 597.)

Ever since the decision of Gibbons *v.* Ogden (22 U. S., 1), it has been held to be a term of the largest import, comprehending intercourse for the purposes of trade in any and all its forms, including transportation. For a full collation of the authorities on that subject see the Lottery Cases. (188 U. S., 321.)

Has Congress under that provision of the Constitution, section 8 of article 1, the power to enact legislation regulating the employment of those necessarily required to manage the vehicles necessary for the transportation of interstate commerce?

That Congress has assumed ever since the adoption of the Constitution that, under the commerce clause, it possesses the power to regulate the employment of and legislate for the protection of those engaged on the vehicles used for interstate transportation is evidenced by the fact that the first Congress which met after the adoption of the Constitution enacted a statute for the regulation and protection of those employed on merchant vessels, then practically the only means of transporting passengers, as well as goods and merchandise, in interstate or foreign commerce. By the act of July 20, 1790,

(1 Stat. L., 131), the employment of seamen on the vessels engaged in interstate commerce was regulated, and from time to time Congress has added to and changed these acts. As late as 1852 Mr. Justice Curtis, in Cooley *v.* Board of Wardens (53 U. S., 299, 316), stated that the validity of these acts had never been questioned.

That the power of Congress to regulate navigation depends solely on the commerce clause is beyond question. In Gibbons *v.* Ogden the question before the court was whether an act of the legislature of the State of New York granting an exclusive right to navigate the waters of the State was repugnant to the National Constitution, and its invalidity was placed solely on the ground that navigation is commerce and therefore within the grant to Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes." In every case decided by the Supreme Court, as well as every other national court since then, the validity or invalidity of every act of Congress in any wise affecting navigation has been determined solely upon the commerce clause. To cite all these cases would serve no useful purpose, but an examination of a few of the most important cases will show that this is one of the few rules of law upon which there is not even an apparent conflict among the decisions of the courts. (United States *v.* Coombs, 12 Pet., 78; Cooley *v.* Board of Wardens, 53 U. S., 299; Pennsylvania *v.* Wheeling Bridge Co., 59 U. S., 421; Foster *v.* Davenport, 63 U. S., 244; Gilman *v.* Philadelphia, 70 U. S., 713; The Daniel Ball, 77 U. S., 557; Miller *v.* Mayor, 109 U. S., 385; Patterson *v.* Bark Eudora, 190 U. S., 169; North Bloomfield, etc., Co. *v.* United States, 88 Fed., 664, 32 C. C. A., 84; The Chusan, 2 Story, 455, Fed. Cas. No. 2717.)

Mr. Justice Story, in his great work on the Constitution, section 1062, says on that subject:

> If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government; it has been exercised with the consent of all America; and it has been always understood to be a commercial regulation. The power over navigation, and over commercial intercourse, was one of the primary objects for which the people of America adopted their government; and it is impossible that the convention should not so have understood the word "commerce," as embracing it. Indeed, to construe the power so as to impair its efficacy would defeat the very object for which it was introduced into the Constitution; for there cannot be a doubt, that to exclude navigation and intercourse from its scope would be to entail upon us all the prominent defects of the confederation, and subject the Union to the ill-adjusted systems of rival States, and the oppressive preferences of foreign nations in favor of their own navigation.

In the *Chusan*, Mr. Justice Story, in speaking of that subject, says:

> The power to regulate commerce includes the power to regulate navigation with foreign nations and among the States; and it is an exclusive power in Congress. This

I conceive has been firmly established by the Supreme Court in Gibbons *v.* Ogden (9 Wheat., 193); and the doctrine stands, as I conceive, upon grounds which cannot be shaken, without endangering the interests of the whole Union, if not the very existence of the Constitution as a frame of government for the professed objects and purposes, which it was intended to accomplish. Now, there cannot be a doubt, that the prescribing of rules for the shipping of seamen, and the navigation of vessels engaged in foreign trade, or trade between the States, is a regulation of commerce. In what respect does the exercise of a power to regulate, control, or extinguish the liens given by the maritime law for material-men upon foreign vessels differ from the power to regulate the shipping of seamen or the navigation of foreign vessels? Each is a regulation of foreign commerce, or commerce among the States.

In the *Daniel Ball* the act of Congress of July 7, 1838 (5 Stat. L., 304), and the amendatory act of August 30, 1852 (10 Stat. L., 61), imposing a penalty on steam vessels to transport passengers or freight on any of the navigable waters of the United States, without first having procured a license and complied with other provisions of the acts of Congress, were before the court. The issues determined were what constituted navigable waters of the United States, subject to the control of Congress, and it was unanimously held:

And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

And on page 565 the court say:

The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress.

In North Bloomfield, etc., Co. *v.* United States, an act of Congress regulating hydraulic mining in California, to the end that navigable waters should not be obstructed, was attacked as unconstitutional. But the United States circuit court of appeals for the ninth circuit, in overruling this contention, held that the power of Congress to pass the act in question under the commerce clause was undoubted.

But it is claimed that such legislation can only be sustained under the police power; that that power is vested in the States solely and not in the General Government, and therefore a regulation for the protection of employees, such as is attempted to be given by this act, can only be exercised by the States.

That Congress might legislate under the commerce clause touching liability of torts or the protection of passengers and employees has been intimated by the Supreme Court in a number of cases.

In Sherlock *v.* Alling (93 U. S., 99, 103) it was said:

It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and

inter-State commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed. * * * Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details, to guard against accident and consequent loss of life.

The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of State authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. * * * Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress.

In Smith *v.* Alabama (124 U. S., 465, 479), a statute of the State requiring locomotive engineers to be examined and licensed by the State authorities was attacked as unconstitutional, so far as it applied to engineers in charge of locomotives engaged in interstate commerce. In sustaining the constitutionality of the act, Mr. Justice Matthews, who delivered the opinion of the court, said:

It would, indeed, be competent for Congress to legislate upon its subject matter, and to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or interstate commerce.

In Railroad Co. *v.* New York (165 U. S., 628, 632), the validity of a statute of the State of New York regulating the heating of steam passenger cars on trains, including those engaged in interstate traffic, was before the court, the contention being that the statute was repugnant to the commerce clause of the national Constitution, and it was held:

Until displaced by such national legislation as Congress may rightfully establish under its power to regulate commerce with foreign nations and among the several States, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, cannot be questioned.

In Chicago, etc., Railway Co. *v.* Solan (169 U. S., 133, 137), the court say:

So long as Congress has not legislated upon the particular subject, they (the statutes of the State) are rather to be regarded as legislation in aid of such commerce, etc.

In Western Union Telegraph Co. *v.* James (162 U. S., 650, 661), the same rule was applied to State legislation affecting telegraph companies.

But if there ever was any room for doubt as to the power of Congress to enact such legislation, it has been removed by what was decided in Patterson *v.* Bark Eudora (190 U. S., 169, 175). In that case the constitutionality of the act of Congress of December 21,

1898 (30 Stat. L., 755, 763), making it unlawful to pay seamen wages in advance, was questioned. It was contended—

That even if the contract be one subject to restraint under the police power, that power is vested in the States and not in the general government, and any restraint, if exercised at all, can only be exercised by the State in which the contract is entered into; that the only jurisdiction possessed by Congress in respect to such matters is by virtue of its power to regulate commerce, interstate and foreign; that the regulation of commerce does not carry with it the power of controlling contracts of employment by those engaged in such service, any more than it includes the power to regulate contracts for service on interstate railroads, or for the manufacture of goods which may be intended for interstate or foreign commerce.

But Mr. Justice Brewer, in answer to this contention, said:

Neither do we think there is in it any trespass on the rights of the States. No question is before us as to the applicability of the statute to contracts of sailors for services wholly within the State. We need not determine whether one who contracts to serve on a steamboat between New York and Albany, or between any two places within the limits of a State, can avail himself of the privileges of this legislation, for the services contracted for in this case were to be performed beyond the limits of any single State and in an ocean voyage.

The expression of the court that "contracts with sailors for their services are exceptional in their character, and may be subjected to special restrictions for the purpose of securing the full and safe carrying on of commerce on the water," must be understood to refer solely to the propriety of the legislation and not the power, for no one will contend now that the commerce clause of the Constitution grants greater power to Congress over the commerce carried on by water than over that transported by land.

This very question was before the court in re Debs (158 U. S., 564, 589), and the court there said:

It is said that the jurisdiction heretofore exercised by the National Government over highways has been in respect to waterways—the natural highways of the country—and not over artificial highways, such as railroads, but the occasion for the exercise by Congress of its jurisdiction over the latter is of recent date,

and after discussing the subject fully, the court concludes, on page 591:

The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.

In the Lottery Cases (188 U. S., 321, 356), Mr. Justice Harlan said:

In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution.

And in Addyston Pipe and Steel Co. *v.* United States (175 U. S., 211, 229), the same objection was made that the Sherman anti-

trust act of July 2, 1890, was an interference with the rights to contract, but was by the court overruled.

In White's Bank *v.* Smith (74 U. S., 646), the act of July 29, 1850, providing for the recording of vessels, was sustained as a proper exercise of the powers of Congress under the commerce clause of the Constitution. And so was the limited liability act of Congress sustained in Providence, etc., Co. *v.* Hill (109 U. S., 578), and in United States *v.* Boston and Albany Railroad (15 Fed., 209), section 4386 Revised Statutes, regulating the transportation of live stock, was sustained under the commerce clause.

In United States *v.* Freight Association (166 U. S., 290, 312) the court say:

> Railroad companies are instruments of commerce, and their business is commerce itself. (State Freight Tax Case, 15 Wall., 232, 275; Telegraph Co. *v.* Texas, 105 U. S., 460, 464.) An act which prohibits the making of every contract, etc., in restraint of trade or commerce among the several States, would seem to cover by such language a contract between competing railroads, and relating to traffic rates for the transportation of articles of commerce between the States, provided such contract by its direct effect produces a restraint of trade or commerce.

These authorities clearly sustain the power of Congress under the commerce clause of the Constitution to legislate for the safety and protection of employees engaged in interstate commerce, whether the transportation be by water or land.

II.

Does the act also regulate intrastate commerce, and if so, is the latter so inseparably connected with the other as to condemn the entire act?

Assuming, but not deciding, that the act is broad enough to include all servants of a common carrier engaged in interstate trade, including those employed solely in transportation within one State and others not employed in transportation at all, the main question is whether it is not separable so as to be valid when invoked by one engaged on a train actually employed in interstate traffic, as the plaintiff alleges in his complaint he was at the time of the injury.

The authorities relied upon by learned counsel for the defendant to sustain their contentions are United States *v.* Reese (92 U. S., 214); Trade-Mark Cases (100 U. S., 82); United States *v.* Harris (106 U. S., 629); Baldwin *v.* Franks (120 U. S., 678); and the Virginia Coupon Cases (114 U. S., 269).

A careful examination of the first four cases will show that the acts construed and declared invalid in those cases were all penal statutes, and that the court laid great stress on that fact.

In United States *v.* Reese, which was an indictment under the national election laws, the court say:

> We are, therefore, directly called upon to decide whether a penal statute, etc. (P. 221.)

In the Trade-Mark Cases the parties were indicted for violations of the trade-mark statute. In that case, in answer to the contention of the counsel for the Government, that as Congress had power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes should be held valid in that class of cases, if no further, the court said:

> To this there are two objections: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. (P. 98.)

In United States *v.* Harris the defendant was indicted under the provisions of section 5519 of the Revised Statutes, and the court followed the rule announced in United States *v.* Reese, citing the excerpt from that case hereinbefore set out as the reason for its conclusions.

Baldwin *v.* Franks was also a criminal case for violation of section 5519, Revised Statutes, the statute declared unconstitutional in the Harris case, the court saying on the subject of separability:

> This statute, considered as a statute punishing conspiracies in a state, is not of that character, for in that connection it has no parts within the meaning of the rule. Whether it is separable, so that it can be enforced in a territory, though not in a state, is quite another question, and one we are not now called on to decide. (P. 685.)

In that case, the court, in distinguishing Packet Co. *v.* Keokuk (95 U. S., 80), said:

> That was not a penal statute, but only a city ordinance regulating wharfage, and the suit was civil in its nature. (P. 688.)

That the employers' liability act is a remedial and not a penal act must be deemed to have been settled by Johnson *v.* Southern Pacific Railway Co. (196 U. S., 1).

The only other case cited is the Virginia Coupon Cases. Those were civil actions arising out of the bond legislation of that State. The various acts before the court in that case were, as said by the court, "but a single scheme the undisguised object of which is to enable the State to rid itself of a considerable portion of its public debt and to place the remainder on terms to suit its own convenience,

without regard to the obligation it owes to its creditors," and the court held:

> The scheme of the whole is indivisible. It can not be separated into parts. It must stand or fall together. The substantive part of it, which forbids the tax collector to receive coupons in payment of taxes, as we have already declared, as, indeed, on all sides is admitted, cannot stand, because it is not consistent with the Constitution. That which is merely auxiliary to the main design must also fall with the principal of which it is merely an incident. (P. 304.)

The correctness of that decision upon the facts is unassailable, as it is based upon the well-settled rule that a statute in part unconstitutional, if the provisions are so mutually connected with and dependent on each other as conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole, and if all could not be carried into effect, the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are dependent, conditional or connected must fall with them. (Allen *v.* Louisiana, 103 U. S., 80.) But it is equally well settled that if a part of a statute is unconstitutional, the remainder is not void unless all the provisions are connected in the subject-matter, dependent on each other, operating together with the same purpose, or otherwise are connected together in meaning that it can not be presumed that the legislature would have passed one without the other. (Packet Co. *v.* Keokuk, 95 U. S., 80; Tiernan *v.* Rinker, 102 U. S., 123; Unity *v.* Burrage, 103 U. S., 447; Railroad Co. *v.* Schutte, 103 U. S., 118, 142; McCullough *v.* Virginia, 172 U. S., 102, 112.)

In McCullough *v.* Virginia, the court, in passing upon this question, declared the true rule to be:

> It is elementary law that every statute is to be read in the light of the Constitution. However broad and general its language, it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach. It is the same rule which obtains in the interpretation of any private contract between individuals. That, whatever may be its words, is always to be construed in the light of the statute; of the law then in force; of the circumstances and conditions of the parties. So, although general language was introduced into the statute of 1871, it is not to be read as reaching to matters in respect to which the legislature had no constitutional power, but only as to those matters within its control.

In Railroad Co. *v.* Schutte, the court said:

> Under these circumstances, etc., the striking out is not necessarily by erasing words, but it may be by disregarding the unconstitutional provision and reading the statute as if the provision was not there. (P. 142.)

Applying these rules to the act before the court, is there any room for the presumption that Congress would not have passed the act unless it could be applied to all employees, including those not

engaged on trains employed in interstate transportation or not engaged in transportation at all?

If the act itself is ambiguous on that subject, reference to the title will at once remove it. That title is "An act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and foreign nations." That in cases of this kind the title of the act, as well as the circumstances surrounding its enactment, as exhibited in public documents, may be referred to is well settled. (Coosaw Mining Co. *v.* South Carolina, 144 U. S., 550, 563; Johnson *v.* Southern Pacific Railway Co., 196 U. S., 1, 19; Petri *v.* Creelman Lumber Co., 199 U. S., 487, 495; Millard *v.* Roberts, 202 U. S., 429, 437.)

In Millard *v.* Roberts the court say:

> The title of the acts are the best brief summary of their purpose.

Another rule of law applicable to the case at bar is that courts will not listen to an objection made to the constitutionality of an act by a party whose right it does not affect in the particular case on trial, and who has, therefore, no interest in defeating it. (Supervisors *v.* Stanley, 105 U. S., 305, 311; in re Garnett, 141 U. S., 1, 12; Clark *v.* Kansas City, 176 U. S., 114, 118; Patterson *v.* Bark Eudora, 190 U. S., 169, 176.)

In Clark *v.* Kansas City the court approved the ruling of the supreme court of Kansas that "a court will not listen to an objection made to the constitutionality of an act by a party whose right it does not affect and who has, therefore, no interest in defeating it," the court saying:

> We concur in this view, and it would be difficult to add anything to its expression.

In re Garnett it was held that—

> It is unnecessary to inquire whether the section is valid as to all kinds of vessels named in it; if it is valid as to the kind to which the steamboat *Katie* belongs it is sufficient for the purpose of this case.

In Patterson *v.* Bark Eudora, Mr. Justice Brewer said:

> We need not determine whether one who contracts to serve on a steamboat between New York and Albany, or between any two places within the limits of a State, can avail himself of the privileges of this legislation, for the services contracted for in this case were to be performed beyond the limits of any single State and in an ocean voyage.

So, as stated by Judge Cooley:

> A legislative act may be entirely valid as to some classes of cases, and clearly void as to others. * * * If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as others. (Cooley Const. Lim., p. 250, 7th ed.)

So, in the case at bar, the injury suffered by the plaintiff, as alleged in the complaint, was while he was engaged in labor performed on a train engaged in interstate commerce, and therefore brings this case within the foregoing rules of law.

For these reasons, I am of the opinion that the act is constitutional.

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IN THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MINNESOTA, FIFTH DIVISION.

JOHN KELLEY v. GREAT NORTHERN RAILWAY COMPANY.

(Syllabus by the court.)

1. The act of Congress of June 11, 1906, commonly called the "Federal employers' liability act," is a regulation of commerce between the States or with foreign nations within the meaning of the commerce clause of the Constitution, and hence within the power of Congress.
2. Decisions defining the meaning and scope of the commerce clause of the Constitution considered and discussed, the trend of all of them being to the effect that the commercial power conferred by the Constitution authorizes legislation with respect to all the subjects of foreign and interstate commerce, *the persons engaged in it, and the instruments by which it is carried on*, and as to such subjects is without limitation.
3. Decisions concerning the validity of State statute upon the questions involved here, considered and discussed, and from them the following general rules deduced: (1) That the *liability* of common carriers for injuries to their employees growing out of their negligence or the negligence of their other employees is a proper subject for Governmental regulation, and Congress has the power, whenever it chooses to exercise it, to make regulations on that subject within its field of control, namely, interstate and foreign commerce, similar to those the State legislatures may make in their field; (2) that such statutes are not in themselves regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce, and a State may therefore, so long as Congress has not legislated upon the particular subject, enact them, in the rightful exercise of its police power to regulate the relative rights and duties of all persons and corporations within its limits, without invading the exclusive power of Congress. But Congress may also, under the power conferred by the commerce clause of the Constitution, enact such legislation as a regulation of interstate or foreign commerce; (3) that while as a general rule the police power belongs to the States, yet Congress may, in the exercise of its power to regulate interstate commerce, impose upon such commerce regulations which are in their essential nature police regulations.
4. If Congress, having for its object the protection of the lives and limbs of railroad employees, can make a specific regulation such as that embodied in the "safety appliance act," as to which it would seem there can be no doubt (Johnson *v.* Southern Pacific Co., 196 U. S., 1), it can, with the same object in view, make a general regulation such as that embodied in this act. The object of the statute is plain upon its face. It is apparent that Congress had in contemplation much more than the mere creation and imposi-

tion of the liability mentioned. It had in contemplation the protection of the lives and persons of the employees of common carriers engaged in interstate or foreign commerce whose employment has any relation to such commerce. With that object in view it enacted the statute, and by its provisions changed certain common-law rules determining *liability* in order to promote that object by securing, so far as the statute could compel it, a more careful selection of employees, a closer and more careful supervision of them, and a more rigid enforcement of their duties.

5. It is *the carrier engaged in interstate commerce* that this act seeks to regulate in relation to its duties to its employees, and the power of Congress extends to, and the act was intended to cover, all the employees whose employment relates to such commerce; and if such common carrier is also at the same time engaged in *intra*-state commerce, using the same means and agencies for both, the power of Congress extends to, and the act was intended to cover, all the employees whose employment relates to such means and agencies.

6. The fact that a common carrier engaged in interstate commerce may also be engaged in *intra*-state commerce, using therein in whole or in part the same means and agencies, can not defeat the power of Congress to regulate such carrier. The regulation of *intra* state commerce which may result in such a case (if indeed in such case there could be said to be any regulation of *intra*-state commerce by such an act as this) is incidental, and due to the manner or method in which the carrier conducts its business and to the fact that it thus combines or commingles its interstate with its *intra*-state commerce.

7. But this act is remedial and not penal, and would therefore not only permit but, if necessary to sustain its validity, require a liberal construction. If, therefore, it were necessary to sustain its validity, there is ample authority for so construing it as to confine its operation to those whose injuries occur at a time when they are actually engaged upon interstate traffic, the facts and circumstances of each particular case determining whether or not the act is applicable. The *Trade-mark* cases and the *McKendree* case distinguished.

down by the courts has, in view of modern methods and conditions, lost

8. The reasoning of the cases in which the fellow-servant rule has been laid much, and in some cases all, of its force. The contributory-negligence rule as applied by the courts, in view of modern conditions surrounding those engaged in certain occupations, is harsh, cruel, and unjust, and ought long since, in the furtherance of justice and in the interest of humanity, to have been greatly modified. And there are substantial reasons why an employer engaged in certain occupations should not be permitted to relieve himself by contract with his employees from liability for injuries caused by his negligence or the negligence of his other employees.

9. The contention that the act violates the fifth, seventh, tenth, and fourteenth amendments of the Constitution is without merit.

10. It appears that defendant is a railroad company engaged in interstate commerce; that plaintiff at the time of his injury, which was subsequent to the passage of the act, to wit, on the 1st day of November, 1906, was an employee of defendant engaged in repairing its railroad track on which such commerce is carried on, and that plaintiff rested his complaint upon the provisions of the Federal employer's liability act: *Held*, upon demurrer raising the point, that such act is constitutional and valid, and that the demurrer should be overruled.

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S. F. White and John H. Norton for plaintiff.
W. A. Begg, J. A. Murphy, and Heber McHugh for defendant.

(Decided March 11, 1907.)

MORRIS, *Judge:*

The defendant herein is a railroad company engaged in interstate commerce. The plaintiff at the time of the injury was an employee of the defendant, engaged in repairing its railroad track on which such commerce is carried on. The complaint rests upon two claims of negligence: The negligence of the defendant and the negligence of its employees who were at the time of the accident the fellow-servants of the plaintiff.

The only ground on which the demurrer was seriously pressed was that the complaint does not state facts sufficient to constitute a cause of action. My view is that the allegations as to the negligence of the employees of defendant who were fellow-servants of plaintiff are sufficient under the act of Congress approved June 11, 1906, entitled "An act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employees," if that act is valid.

The defendant has attacked its validity on constitutional grounds, and to that question the argument of counsel was mainly directed, and upon it a decision invited. If the constitutionality of the act is sustained, as I think it must be, the demurrer must fail. I have therefore deemed it necessary to decide that question, and to that question only is this opinion directed. That act, after the title above quoted, is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

SEC. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negli-

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gence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

SEC. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: *Provided, however*, That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.

SEC. 4. That no action shall be maintained under this act, unless commenced within one year from the time the cause of action accrued.

SEC. 5. That nothing in this act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees under the safety-appliance act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three. (U. S. Stats. at Large, 1906, vol. 34, p. 232.)

As I understood the argument of counsel for defendant, it was conceded that it might not be open to question that just as the legislatures of the States have the right to change the rules of law determining the liability of parties as administered in their courts in cases within their jurisdiction, so has Congress the right by appropriate legislation to change such rules of law as administered in the courts of the United States and so as to control only cases pending therein, for the reason that as mere judicial rules founded on the common law or upon considerations of public policy, but having all the force of law, they are no more sacred than legislative enactments which may be altered or repealed at the will of the legislative department of the Government. But they contend—and in that I think they are correct—that the scope of the act in question is much broader than that, and that Congress obviously intended it to be so; that is was intended that it should become the supreme law of the land of general application, and as such binding upon all courts, State and Federal, and should fix imperative rules by which all of them must hereafter be governed; and that therefore, if valid at all, it can only be valid as a regulation of commerce under the power conferred upon Congress by section 8 of Article I of the Constitution of the United States, which, for the purposes of this discussion, is as follows:

"The Congress shall have power," among other things, "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and * * * "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Proceeding then upon that assumption, their contention is that the act is unconstitutional and invalid.

The first ground on which that contention is based is *that the subject-matter of the act is the creation and enforcement of liabilities*

growing out of the negligence of common carriers engaged in interstate or foreign commerce to their employees, and it is therefore not a regulation of commerce among the States or with foreign nations within the meaning of that clause of the Constitution, and hence not within the power of Congress.

As preliminary and leading up to a more direct consideration of the power of Congress in reference to such legislation as that embodied in this act, it may be well to call attention very briefly to some of the decisions, State and Federal, as to the power of the State legislatures in reference thereto, a proper understanding of which will prepare us to correctly apprehend the true doctrine in reference to the extent of the power reposed in Congress.

It can no longer be questioned, in the face of these decisions, that the common-law rules which are affected by this act are simply rules of decision enunciated by the courts, according to their ideas of justice and public policy, and are necessarily subject to the control of the State legislatures in the exercise of what is commonly termed the police power. But when the State legislation is directed to particular occupations, such, for instance, as that of railroad companies, it is subject to certain limitations growing out of the constitutional provisions of the fourteenth amendment prohibiting the taking of property without due process of law, or the denying to any person the equal protection of the laws, or an interference with the liberty of contract. It seems that the contributory-negligence rule has never been directly modified by State legislation; at least none such has been called to my attention. But the reasoning of the cases would apply with equal force to that rule.

These decisions were rendered in cases which arose under various State statutes: In Missouri Pacific Ry. Co. *v.* Mackey, 127 U. S., 205, under a Kansas statute, which provided that "every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employees, to any person sustaining such damage;" in Minneapolis and St. Louis Ry. Co. *v.* Herrick, 127 U. S., 210, under a statute of Iowa, providing that "every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they are employed, and no contract which restricts such liability shall be legal or binding;" in McGuire *v.* C., B. and Q. Ry. Co., 108 N. W., 902, under the Iowa statute, after it had been amended

by adding a provision similar to that contained in section 3 of the act of Congress here in question, to the effect that no contract of relief, benefit, or indemnity entered into prior to the injury, between the person so injured and such corporation, should constitute a bar or defense to an action under the statute; in Tullis *v.* Lake Erie and Western R. R. Co., 175 U. S., 348, under a statute of Indiana, in reference to the liability of railroad and other corporations, for damages for personal injuries suffered by an employee while in its service; in Martin *v.* Pittsburg and Lake Erie R. Co., 27 Sup. Ct. Rept., 100, under a statute of Pennsylvania, which will be set forth hereafter. And many other cases under similar statutes might be cited.

All of these decisions are to the effect that it is competent for a State, in the exercise of the police power, to change or modify the rules of decision determining the liability of employers to their employees, as applied to particular pursuits or callings, and that legislation to that effect is not obnoxious to the fourteenth amendment to the Constitution, if all persons brought under its influence are treated alike under similar circumstances and conditions, and if, with a wide legislative discretion, the classification is practical and not palpably arbitrary. In other words, the liability of those in particular occupations, as, for instance, railroad companies, for injuries to their employees, is a proper subject for governmental regulation, and a State may make such reasonable regulations on the subject with respect to all within its territorial jurisdiction as the legislature thereof may think that the public welfare demands, subject only to the limitations above indicated.

Counsel for defendant, as I have understood them, not only admit but urge that such is the well-established law; but they contend that such legislation is within the power of the State legislatures only, and that it is not within the power of Congress under the commerce clause of the Constitution to enact such a statute as that here under consideration with reference to common carriers engaged in interstate commerce, because it merely changes or modifies the common-law rules determining the *liability*, and thus merely creates a *liability* of such carriers to their employees for their negligence or for the negligence of the fellow-servants of the injured employee, and in no way prescribes rules for carrying on traffic or commerce among the States, and therefore in no way regulates such commerce.

As I have said above, I have referred to and given the effect of the foregoing decisions because I think they prepare us to correctly apprehend the effect of those which more nearly touch the above contention and from which the true doctrine in reference to the extent of the power of Congress may be ascertained.

In this latter class are those decisions in which the Supreme Court of the United States has had under consideration State statutes

whose validity was attacked on the ground that they affected interstate commerce, and were regulations of such commerce, and were therefore within the exclusive power of Congress. While it might be said that in none of these cases was the exact question raised which is here being considered, yet, as I think, they not only throw light upon it, but indicate beyond question the views entertained thereon by the justices of our highest court.

But before proceeding to the consideration of these cases let us first ascertain, as far as we can, from other decisions, the meaning and scope of the commerce clause of the Constitution.

In determining the meaning and scope of that clause the Supreme Court has, from the time of the delivery of the opinion of the great Chief Justice in Gibbons *v.* Ogden until now, seemed to think it undesirable to give to the words therein any hard and fast definition, or to mark with absolute certainty the extent of the power thereby conferred. It has been declared that interstate commerce is a term of very large significance (Hopkins *v.* U. S., 171 U. S., 578, 597, citing many cases), and that the power conferred by the Constitution is, as to interstate and foreign commerce, one without limitation. "It authorizes legislation with respect to all the subjects of foreign and interstate commerce, *the persons engaged in it, and the instruments by which it is carried on.*" (Sherlock *v.* Alling, *infra.*)

In Telegraph Company *v.* Texas (105 U. S., 460, p. 464) the court says:

> In Pensacola Telegraph Company *v.* Western Union Telegraph Company (96 U. S., 1) this court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate business. A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. *Both companies are instruments of commerce, and their business is commerce itself.*

In Lottery cases (188 U. S., 321, 346) Mr. Justice Harlan, delivering the opinion of the majority of the court, reviews at great length the cases in which the court has considered the meaning of the term "commerce among the several States" in the commerce clause of the Constitution and the power of Congress thereunder, and very completely summarizes the effect of the decisions. I can only quote a small portion of what he says, but an examination of the case will show the very large significance of the term and the difficulty of giving it a precise definition and the wide scope of the power. He says:

> The leading case under the commerce clause of the Constitution is Gibbons *v.* Ogden (9 Wheat., 1, 189, 194). Referring to that clause, Chief Justice Marshall said: "The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and

selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. * * * It has been truly said, that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its applications to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain, intelligible cause which alters it. The subject to which the power is next applied is to commerce 'among the several States.' The word 'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the States can not stop at the external boundary line of each State, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. * * * The genius and character of the whole Government seem to be that its action is to be applied to all the external concerns of the Nation and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government * * *."

Again: "We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is *complete in itself*, may be exercised *to its utmost extent*, and acknowledges *no limitations, other than are prescribed in the Constitution.* These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress *as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.*"

* * * * * * *

This reference to prior adjudications could be extended if it were necessary to do so. The cases cited however sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce clause. *They show that commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject only to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed.*

Bearing in mind, then, the large significance given to the terms of the commerce clause and the wide scope of the power thereby conferred, let us consider some of those cases, wherein the validity of State statutes is concerned, to which I have referred as more nearly touching the question raised here.

Among them are the following: In Cooley *v.* Board of Wardens, 53 U. S., 298, under a Pennsylvania statute providing that a vessel which neglects or refuses to take a pilot shall forfeit and pay to the master warden of the pilots, for the use of the Society for the Relief of Distressed and Decayed Pilots, their widows and children, one-half the regular amount of pilotage; in Morgan *v.* Louisiana, 118 U. S., 455, under statutes of Louisiana establishing a system of quarantine laws; in Smith *v.* Alabama, 124 U. S., 465, under an Alabama statute requiring locomotive engineers to be examined and licensed by a board to be appointed for that purpose; in Nashville, Chattanooga and St. Louis Railway *v.* Alabama, 128 U. S., 96, under an Alabama statute requiring locomotive engineers and other persons employed by a railroad company in a capacity which calls for the ability to distinguish and discriminate between color signals, to be examined, etc.; in Western Union Telegraph Company *v.* James, 162 U. S., 650, under a Georgia statute requiring every telegraph company with a line of wires, wholly or partly within that State, to receive dispatches, and, on payment of the usual charges, to transmit and deliver them with due diligence, under a penalty of $100; in Hennington *v.* Georgia, 163 U. S., 299, under a Georgia statute forbidding the running of freight trains on any railroad in the State on Sunday and providing for the trial and punishment on conviction of a superintendent of a railroad company violating that provision; in New York, New Haven and Hartford R. R. *v.* New York, 165 U. S., 628, under a New York statute regulating the heating of steam passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto; in Missouri, Kansas and Texas Ry. *v.* Haber, 169 U. S., 613, under a Kansas statute relating to bringing into the State cattle liable to or capable of communicating Texas, splenic, or Spanish fever to any domestic cattle of the State; in Rasmusson *v.* Idaho, 181 U. S., 198, under a Colorado statute relating to the introduction of infectious or contagious diseases among the cattle and horses of that State; in Sherlock *v.* Alling, 93 U. S., 99, under a statute of Indiana giving a right of action to the personal representatives of the deceased, where his death is caused by the wrongful act or omission of another; in Peirce *v.* Van Dusen, 78 Fed., 693, under a statute of Ohio for the protection and relief of railroad employees, providing that railroad or railway corporations or companies shall not make certain contracts for exemption from liability to their employees, shall not use defective cars, etc., and to a certain extent abrogating

in actions against such companies for personal injuries to employees the rule as to fellow-servants; in Martin *v.* Pittsburg and Lake Erie Ry. Co., *supra*, under a statute of Pennsylvania providing that when any person should sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee, provided that this section shall not apply to passengers.

In all of these cases the State legislation has been sustained as a valid exercise of the police power of the State, although it may affect interstate commerce, against the contention that it was an invasion of the power given by the Constitution to Congress to regulate interstate commerce. But in all of them the court has been careful to indicate that, as to interstate commerce, Congress also has the power to enact such legislation; that while the power of Congress to regulate such commerce is plenary, it is competent for the States to pass such legislation *until Congress acts;* and that such State legislation, in so far as it may conflict therewith, must yield to similar legislation by Congress, *whenever it chooses to exercise its power.*

In M., K. and T. Ry. *v.* Haber, at page 635, the court says:

> These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a State belong primarily to such State under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress and be reached by national legislation, any action taken by the State upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress must be respected *until Congress intervenes.*

In Cooley *v.* Board of Wardens, after holding that the power to regulate commerce includes the regulation of navigation and that pilot laws are regulations of navigation, and therefore of commerce, within the grant to Congress of the commercial power, but that the mere grant of the commercial power to Congress does not forbid the States from passing laws to regulate pilotage, the court goes on to say, at page 318:

> The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject-matter. If they are excluded, it must be because the nature of the power thus granted to Congress requires that a similar authority should not exist in the States. If it were conceded, on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress as effectually and perfectly excludes the States from all future legislation on the subject as if express words had been used to exclude them. And, on the other hand, if it

were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, *but its exercise by Congress*, which may be incompatible with the exercise of the same power by the States, and that the States may legislate *in the absence of Congressional regulations.*

In Nashville, Chattanooga and St. L. Ry. *v.* Alabama, at page 99, the court says:

It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and *liabilities* of employees and others on railway trains engaged in that commerce, and that such legislation will supersede any State action on the subject. *But until such legislation is had* it is clearly within the competency of the States to provide against accidents on trains whilst within their limits.

In New York, New Haven and Hartford R. R. *v.* New York the court said, at page 631:

According to numerous decisions of this court (some of which are cited in the margin) sustaining the validity of State regulations enacted under the police powers of the State, and which incidentally affected commerce among the States and with foreign nations, it was clearly competent for the State of New York, *in the absence of national legislation covering the subject*, to forbid, under penalties, the heating of passenger cars in that State, by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in interstate commerce. While the laws of the States must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution, Gibbons *v.* Ogden, 9 Wheat. 1, 211, the mere grant to Congress of the power to regulate commerce with foreign nations and among the States did not of itself, *and without legislation by Congress*, impair the authority of the States to establish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people.

It may be urged that the cases above quoted from, and some of the others cited, do not directly bear upon the question which we have here. But the cases of Sherlock *v.* Alling, Peirce *v.* Van Dusen, and Martin *v.* Pittsburg and Lake Erie R. R. Co., *supra*, do bear directly upon that question, and in my judgment completely decide it, each of them being a case in which the statute changed the common-law rule of liability.

It would seem to be a little remarkable that in these three cases, as well as in the others, all of which arose before Congress had seen fit to take any action on the subject, the validity of such legislation by the States, where it affected common carriers engaged in interstate commerce, was assailed on the ground that it did regulate interstate commerce, and was therefore an invasion of the power of Congress over that subject, while now, since Congress has acted, in a statute whose provisions apply only to those engaged in interstate commerce, the opposite contention is made.

In Sherlock *v.* Alling it was contended (quoting from the opinion at the bottom of page 101)—

that the statute of Indiana creates a new liability, and could not, therefore, be applied to cases where the injuries complained of were caused by marine torts, without interfering with the exclusive regulation of commerce vested in Congress. The position of the defendants, as we understand it, is that as by both the common and maritime law the right of action for personal torts dies with the person injured, the statute which allows actions for such torts, when resulting in the death of the person injured, to be brought by the personal representatives of the deceased, enlarges the liability of parties for such torts, and that such enlarged liability, if applied to cases of marine torts, would constitute a new burden upon commerce.

After referring to the cases in which State legislation had been held invalid because directly imposing a tax or burden upon interstate commerce, and after holding that no such operation could be ascribed to the Indiana statute, the court, speaking by Mr. Justice Field, at page 103, goes on to say:

That statute imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the *liability* of all persons within the jurisdiction of the State for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the State, whether on land or on water. General legislation of this kind, prescribing the *liabilities* or duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection, *because it may affect persons engaged in foreign or interstate commerce.* Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, *though the legislation might indirectly affect the commerce of the country.* Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.

It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation; prescribed what shall constitute American vessels and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital, and other dues they shall be subjected; what rules they shall obey in passing each other, *and what provisions their owners shall make for the health, safety, and comfort of their crews.* Since steam has been applied to the propulsion of vessels legislation has embraced an infinite veriety of further details, to guard against accident and consequent loss of life.

The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. *Whatever, therefore, Congress determines, either as to a regulation or the liability for its*

infringement, is exclusive of State authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, *the laws of Congress are silent,* and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said generally that the legislation of a State not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operation of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water or engaged in commerce, foreign or interstate, or in any other pursuit. In our judgment, the statute of Indiana falls under this class. *Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies,* giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress.

In Peirce *v.* Van Dusen, the circuit court, composed of Mr. Justice Harlan and Judges Taft and Lurton, had under consideration the Ohio statute which changed or modified the fellow-servant rule, thus, as is contended here, creating a liability which did not theretofore exist. It is true that the principal question before the court was whether the statute of Ohio was applicable to cases against a receiver of a railroad corporation, especially one acting under the orders of a Federal court; but the court went on to consider its applicability to railroad companies doing business in Ohio and engaged in interstate commerce (the railroad company in that case being so engaged) and the question of its validity arising from the fact that it thus affected such commerce.

Speaking by Mr. Justice Harlan, the court says, at page 698:

So much as to the scope and true meaning of the Ohio statute, without reference to the courts in which it may be enforced. If the statute means what we hold it to mean, must not full effect be given to it in actions for personal injuries brought against a receiver in a court of the United States? This question must be answered in the affirmative. Such legislation is not liable to the objection that it encroaches upon Federal authority, or upon the jurisdiction or power of the United States court. The statute does nothing more than to prescribe a rule of action to be observed by all within the State. The authority to enact it is derived from the general power of the State to regulate the exercise of the relative rights and duties, and to provide for the safety, of all persons within its territorial jurisdiction. It is the duty of the Federal court sitting in this State to enforce all enactments having such objects in view, unless they encroach upon the powers and authority of the United States. That duty arises out of the statute declaring that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." (Rev. Stat., sec. 721; Baltimore and O. R. Co. *v.* Camp, 31 U. S., app. 213, 13 C. C. A., 233, and 65 Fed., 952.) Indeed, if Congress had not so declared, this court, upon principles of comity, and in support of the public policy of the State, might well recognize and

enforce, in actions brought against receivers of railroads, any rules established by the State for like actions brought against railroad companies.

The Ohio statute is not applicable alone to railroad corporations of Ohio engaged in the domestic commerce of this State. It is equally applicable to railroad corporations doing business in Ohio *and engaged in commerce among the States*, although the statute, in its operation, *may affect in some degree a subject over which Congress can exert full power.* The States may do many things affecting commerce with foreign nations and among the several States *until Congress covers the subject by national legislation.*

Then, after citing and commenting upon many of the cases which I have above cited, the court says, at page 700:

Undoubtedly, the whole subject of the liability of interstate railroad companies for the negligence of those in their service may be covered by national legislation enacted by Congress under its power to regulate commerce among the States. But as Congress has not dealt with that subject, it was competent for Ohio to declare that an employee of any railroad corporation doing business here, including those engaged in commerce among the States, shall be deemed, in respect to his acts within this State, the superior, not the fellow-servant, of other employees placed under his control. If the effect of the Ohio statute be, as undoubtedly it is, to impose upon such corporations, in particular circumstances, a liability for injuries received by some of its employees which would not otherwise rest upon them according to the principles of general law, that fact does not release the Federal court from its obligation to enforce the enactments of the State. Of the validity of such State legislation we entertain no doubt.

It is difficult to understand why, if Congress may regulate the liability of common carriers engaged in interstate commerce to strangers, it may not regulate their liability to their employees, the protection of interstate commerce and of the persons engaged therein, being as much involved in the one case as in the other.

In the case of Martin *v.* Pittsburg and Lake Erie R. R. Co., the court had under consideration the Pennsylvania statute whose provisions have been given above. The plaintiff, Martin, was injured while he was on a train of the railroad company, in the employ of the United States as a railway postal clerk on a route extending from Cleveland, Ohio, to Pittsburg, Pa. The injuries arose from the derailing in Pennsylvania of the train by the negligence of the crew of a worktrain in permitting a switch leading to a side track to be open. The defendant among other defenses pleaded the law of Pennsylvania above referred to and alleged that it was applicable and relieved from responsibility. In reply the plaintiff denied the existence and applicability of the statute, and further contended that the statute if existing and applicable was void, first because contrary to the power delegated to Congress to establish post-offices and post-roads; second, because repugnant to the commerce clause of the Constitution, and, third, because in conflict with the equal protection and due process clauses of the fourteenth amendment, and also the clause prohibiting a State from making or enforcing any law which

shall abridge the privileges or immunities of citizens of the United States. On the trial before a jury the court held the statutes to be applicable and valid, and hence operative to defeat a recovery. There was a verdict and judgment in favor of the defendant, which was severally affirmed by the circuit court and by the supreme court of the State of Ohio.

The Supreme Court of the United States also affirmed the judgment, holding the statute to be applicable and valid. After disposing of the first contention the court went on to consider the second contention as to the repugnancy of the statute to the commerce clause of the Constitution, and, speaking by Mr. Justice White, said:

> This brings us to the second contention—the repugnancy of the Pennsylvania statute to the commerce clause of the Constitution. It is apparent from the decision in the Price case, just previously referred to, that in deciding that question we must determine the application of the statute to the plaintiff in error, wholly irrespective of the fact that at the time he was injured he was a railway postal clerk. In other words, the validity or invalidity of the statute is to be adjudged precisely as if the plaintiff was, at the time of the injury, serving for hire in the employment of a private individual or corporation.
>
> Under the circumstances we have stated, the case of Pennsylvania R. R. Co. *v.* Hughes, 191 U. S., 477, clearly establishes the unsoundness of the contention that the Pennsylvania statute in question was void because in conflict with the commerce clause. In that case a horse was shipped from a point in the State of New York to a point in the State of Pennsylvania under a bill of lading which limited the right of recovery to not exceeding $100 for any injury which might be occasioned to the animal during the transit. The horse was hurt within the State of Pennsylvania through the negligence of a connecting carrier. In the courts of Pennsylvania, applying the Pennsylvania doctrine which denies the right of a common carrier to limit its liability for injuries resulting from negligence, a recovery was had in the sum of $10,000, the value of the animal. On writ of error from this court the judgment of the supreme court of Pennsylvania was affirmed, it being held that, at least, *in the absence of legislation by Congress on the subject*, the effect of the commerce clause of the Constitution was not to deprive the State of Pennsylvania of authority to legislate as to those within its jurisdiction concerning *the liability* of common carriers, *although such legislation might, to some extent, indirectly affect interstate commerce.* The ruling in the Hughes case in effect but reiterated the principle adopted and applied in Chicago, M. and St. P. R. R. Co. *v.* Solan, 169 U. S., 133, *where an Iowa statute forbidding a common carrier from contracting to exempt itself from liability was sustained as to a person who was injured during an interstate transportation.*
>
> The contention that because, in the cases referred to, the operation of the State laws which were sustained was to augment the liability of a carrier, therefore the rulings are inapposite here, where the consequence of the application of the State statute may be to lessen the carrier's liability, rests upon a distinction without a difference. The result of the previous rulings was to recognize, *in the absence of action by Congress*, the power of the States to legislate, and of course this power involved the authority to regulate as the State might deem best for the public good, without reference to whether the effect of the legislation might be to limit or broaden the responsibility of the carrier. In other words, the assertion of Federal rights is disposed of when we determine the question of power, and doing so does not involve considering

the wisdom with which the lawful power may have been under stated conditions exerted. * * *

The contention that because plaintiff in error, as a citizen of the United States, had a constitutional right to travel from one State to another, he was entitled, as the result of an accident happening in Pennsylvania to a cause of action not allowed by the laws of the State, is in a different form to reiterate that the Pennsylvania statute was repugnant to the commerce clause of the Constitution of the United States. Conceding, if the accident had happened in Ohio, there would have been a right to recover, that fact did not deprive the State of Pennsylvania of its authority to legislate so as to affect persons and things within its borders. The commerce clause not being controlling *in the absence of legislation by Congress*, it follows, of necessity, that the plaintiff in error, as an incident of his right to travel from State to State, did not possess the privileges, as to an accident happening in Pennsylvania, to exert a cause of action not given by the laws of that State, and had no immunity exempting him from the control of the State legislation.

In the case of Pennsylvania R. R. Co. *v.* Hughes, referred to in the opinion of Mr. Justice White, above quoted, the court says, at page 491:

It is true that this language was used of a statute of Iowa enacting a rule of obligation for common carriers in that State. But the principle recognized is that *in the absence of Congressional legislation upon the subject a State may require a common carrier, although in the execution of a contract for interstate carriage, to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties.*

We can see no difference in the application of the principle based upon the manner in which the State requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the State courts. The State has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding. This requirement in the case just cited is held *in the absence of Congressional action providing a different measure of liability* when contracts, such as the one now before us, are made in relation to interstate carriage. Its pertinence to the case under consideration renders further discussion unnecessary.

In C., M. and St. P. Ry. Co. *v.* Solan, 169 U. S., at page 137, the court says:

They are not, *in themselves*, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. *So long as Congress has not legislated upon the particular subject*, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits.

The effect of these decisions and of all those cited above, as I understand them, is that such legislation as that considered and reviewed therein may not be, and is not necessarily and in and of itself, a regulation of commerce, but that it may be adopted as such, and that Congress can enact such legislation as a regulation of inter-

state commerce. And in the decisions from which I have so fully quoted the court recognizes and declares, if the language means anything, that Congress has power under the commerce clause of the Constitution to enact such legislation as that here under consideration, changing as to common carriers engaged in interstate commerce common-law rules of liability, as a regulation of interstate commerce.

It is contended that the portions of the opinions which I have emphasized are *obiter dicta*. If they are, it is strange, indeed unfortunate, that the eminent judges of our highest court should so often fall into such *dicta*. But they are not *obiter dicta*. The question of the invasion by the State legislation of the power of Congress under the commerce clause of the Constitution was necessarily involved therein, and if such legislation was a mere creation of a liability, and was for that reason not a regulation of commerce, and therefore not within the power of Congress, as is contended here, it is difficult to understand why the court did not so declare, and thus dispose of the cases. If the power to enact such legislation is in the State legislatures only and not in Congress, the court had only to say so, and it was unnecessary to so elaborately discuss that question. By doing so and by saying what they did they recognized that the question of the power of Congress was involved in the cases, and they recognized and declared that such legislation is within the power conferred by the commerce clause.

Nor are these cases to the effect that the power of Congress can only be exerted by prescribing that some particular thing shall be done. And it would seem to be apparent that this act is none the less a rule or regulation under which the business of such carriers is to be conducted and by which it is to be governed, because it does not prescribe that some specific thing should be done or some specific appliance used.

In Johnson *v.* Southern Pacific Co. (196 U. S., 1) the court had under consideration the act of Congress known as "the safety appliance act" of March 2, 1893 (U. S. Stats., vol. 27, 531), requiring railroads engaged in interstate commerce to equip their locomotives, trains, and cars with air brakes, automatic couplers, etc. The plaintiff claimed that he was relieved of assumption of risk under common-law rules by section 8 of that act, which provided—

> That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

That this act was squarely within the power of Congress under the commerce clause of the Constitution was not questioned. And that in connection with such a regulation as that requiring the use of such appliances Congress had the power, under the commerce

clause of the Constitution, to change the common-law rule as to the assumption of risk seems to have been thought too clear for argument.

In that case the court said:

> The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars, and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other.

And again:

> The primary object of the act was to promote the public welfare by securing the safety of employees and travelers.

The court here recognizes that the public welfare, as involved in interstate commerce, may be promoted by legislation of Congress for the protection of persons employed in carrying it on.

While the act here under consideration does not state either in its title or body, as did that act, what the object of it is, it seems to me that such object is plain upon its face. It will be apparent, I think, from a mere reading of the statute that Congress had in contemplation much more than the mere creation and imposition of the liability mentioned upon common carriers engaged in interstate commerce to their employees. It seems to me to be apparent that it had in contemplation the protection of the lives and persons of the employees of such carriers whose employment had any relation to such commerce, and that it enacted the statute for that purpose, and by its provisions changed certain common-law rules determining liability in order to promote that object by securing a more careful selection of employees, a closer and more careful supervision of them, and a more rigid enforcement of their duties, and thus to promote the public welfare.

In Mikkelson *v.* Truesdale (65 N. W., 260; 63 Minn., 137) the supreme court of Minnesota had under consideration the State statute entitled "An act to define the liabilities of railroad companies in relation to damages sustained by their employees." Neither in the title nor in the body of the act was anything said as to its object, but the court said that it was—

> a police regulation intended to protect life, person, and property by securing a more careful selection of servants and a more rigid enforcement of their duties by railroad companies by making them pecuniarily responsible to those of their servants who are injured by the negligence of incompetent or careless fellow-servants.

Now, if Congress has power, as a regulation of commerce, having in view the promotion of the public welfare by securing the safety of employees and travelers, to pass an act like the safety-appliance act, requiring the use of specific appliances, and can in connection therewith and to promote the objects of the statute change the common-law rule as to the assumption of risk, has it not power as a

regulation of commerce to pass such an act as the one we are here considering?

Must Congress be obliged, in order to bring its legislation within the commerce clause of the Constitution, to provide specifically and definitely for all the conditions that may exist and for all of the almost infinite situations and circumstances that may arise affecting the safety of employees in the conduct of the business of common carriers? Must it specifically and definitely provide what precautions should be taken for the safety of employees under all such conditions and in all these almost innumerable situations? Can it not say generally, as it has in effect said in this act, we can not anticipate all of these conditions and situations; we can not provide for all the precautions which ought to be taken for the safety of employees by common carriers engaged in interstate commerce; but in order to secure, under all conditions and in all situations, a more diligent and thorough performance of the duties of such carriers, and in order to compel and insure that every proper precaution shall be taken for the safety of their employees, both as to the agencies and instrumentalities used and as to the selection and supervision of such employees, and in order to minimize as far as possible the dangers to such employees, we will not permit such carriers, in case of the death or injury of an employee resulting from their negligence or the negligence of any of their servants, to invoke certain common-law rules for the purpose of escaping liability, but they shall be governed by and their liability shall be ascertained by the rules herein laid down? May not Congress say, as it has, in effect, said in this act, we declare that interstate commerce, including those engaged therein and the public to be served thereby, must be safeguarded by the rules of liability herein prescribed and that such commerce must bear the burden hereby imposed? It seems to me there can be but one answer to these questions, and that is that Congress need not provide specifically and definitely for all such conditions and situations, and that it has power under the commerce clause to pass such an act.

Undoubtedly if Congress may prescribe specific rules it may prescribe general rules, and may prescribe the consequences which shall follow in case of a violation of either. There is no suggestion in the Constitution or in reason to the contrary. The field belongs to Congress and it may, if it sees fit, occupy all of it. Congress has by the statute here in question in effect said: The employees of those engaged in interstate commerce are too frequently placed in peril of life and limb through the negligence of their employers and through the negligence of their own fellow-servants. Such commerce itself is subject to unnecessary hazards for the same reason. This must be prevented, or at least reduced to a minimum. The negligence of fellow-servants is in large measure under the control of the employers,

if the latter but exercise proper care in the selection of such servants and in their supervision and require of them the performance of tasks only which will impose reasonable tests upon their skill or powers of endurance. Increasing the liability of the employer will tend to decrease those perils and hazards. The duties of such carriers as declared by the courts and as prescribed by particular statutes are well known and understood, and such duties must be more faithfully performed and such carriers must see to it that greater precautions are taken to safeguard such commerce and to protect their employees engaged therein, and in order to secure this the rules of their liability shall be as herein provided.

If it be contended that the creation of such liabilities is an exercise of the police power, and that such power belongs to the States, the answer is, that while as a general rule the police power belongs to the States, and was by the Constitution reserved to the States, yet Congress may, in the exercise of its power to regulate commerce, impose upon such commerce regulations which are in their essential nature police regulations. Upon no other theory can the decisions in Johnson *v.* Southern Pacific Co., *supra*, and in Lottery cases, *supra*, be justified and sustained.

I am therefore of the opinion that the first ground on which the constitutionality of this act is denied is not well taken.

The second ground on which the constitutionality of the act is attacked is: *That, if it be admitted that the act does regulate interstate commerce, it also regulates commerce that is exclusively within the several States, and that the latter is so inseparably combined with the former as to condemn the whole act as unwarranted by the Constitution.* The contention, as I understand it, is that a common carrier engaged in interstate commerce may be engaged in intrastate commerce also, and the language of the act being so broad as to cover all the employees of such carrier, without reference to the nature of their employment, it is not only a regulation of interstate commerce, but also a regulation of intrastate commerce, and as it is impossible to so construe it as to separate the two it must be held invalid.

This contention is, I think, answered by what I have already said, and by the decisions to which I have referred, and others to which I shall call attention.

It is well to recall the familiar rule that while it is an imperative duty from which no court should shrink to declare void any statute the unconstitutionality of which is made apparent, due regard to the boundary between the legislative and the judicial departments of the Government requires that this duty should be exercised with the greatest caution. Under this rule where under one construction a statute may be invalid, if there is another reasonable construction which would sustain its validity, the latter should be adopted. (Am.

and Eng. Ency. of Law, old edition, vol. 3, p. 674, note and cases there cited.) If, therefore, it were necessary to sustain its validity that this act should be so construed as to confine its operation to those whose injuries occurred at a time when they were actually engaged upon interstate traffic, I think that, having in view its object, there is ample authority for such construction. And the courts, giving it such construction, should determine from the facts and circumstances of each particular case whether or not it is applicable. Even in the Johnson case where the act under consideration was not wholly remedial the Supreme Court refused to give it an absolutely strict construction, as had been done by the circuit court of appeals. The act here under consideration is not penal, but may be regarded as wholly remedial, and as such would not only permit but require a wider latitude of construction. It would seem to be absurd to say that where Congress has enacted a statute of a remedial nature it must be held unconstitutional, because, while it might be construed to apply to a subject clearly within the control of Congress, it might also be construed to apply to something not within such control.

But it is not necessary to so narrowly construe the act in order to sustain its validity. It should be fairly and reasonably construed (Church of The Holy Trinity *v.* U. S., 143 U. S., 457), having in view its object, and bearing in mind that it is *the carrier engaged in interstate commerce* which the act seeks to regulate in relation to its duty to its employees. From a mere reading of the act it will be apparent that no argument is necessary to show that the expression "any common carriers" in the second section of the act means "any common carriers engaged in interstate or foreign commerce."

Congress evidently intended that the act should embrace all the employees to whom its power under the commerce clause of the Constitution extends, and if the power of Congress over interstate commerce is one without limitation, plenary and complete in itself, and which may be exerted to its utmost extent, subject *only* to such limitations as the Constitution of the United States imposes, and if it authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on; and if under such power Congress can, for the purpose of promoting the safety of employees engaged therein, and of persons and property carried therein, enact legislation such as that contained in this act under which the liability of carriers engaged in such commerce to their employees shall be determined (and the cases cited fully sustain all the foregoing propositions), it would seem to be apparent that it can make such legislation applicable to all employees of such carriers whose employment relates to such commerce. And if such carrier is also engaged in intrastate commerce, using therein the same means and agencies, such as railroad tracks,

switches, cars, etc., it would also seem to be apparent that Congress can make such legislation applicable to all employees of such carrier whose employment relates to such means and agencies. In such case it may be said that the employment of such employees relates to interstate commerce.

It seems to me that, as to a carrier engaged in both interstate and intrastate commerce, the act applies and was intended to apply, where such carrier uses, in whole or in part, the same means and agencies in both, and where the employment of the injured employee has some relation to such interstate commerce or to such means and agencies.

If the carrier's business is carried on in such a way that the act must apply to *all* its employees for the reason that the employment of all of them relates to interstate commerce, it can make no difference, so far as the power of Congress to pass the act is concerned.

That it is within the power of Congress to regulate the liability of common carriers engaged at the same time in both interstate and intrastate commerce, and using the same means and agencies for both, to all their employees whose employment has some relation to such means and agencies, and that Congress so intended, would seem to be apparent when we reflect that the safety of interstate commerce, and the protection of the lives and persons of those engaged therein, and of the persons and property carried therein, may depend as much upon the taking of proper precautions for the safety of employees engaged upon intrastate traffic as upon the taking of such precautions for the safety of those engaged upon interstate traffic only.

Let us suppose that such carrier has commingled in a train cars containing State traffic only with those containing interstate traffic, and that while engaged on such train a brakeman is injured while setting a brake on one of the cars containing only State traffic; or, again, that such carrier has a yard in which are handled both cars containing only State traffic and those containing interstate traffic, and that while handling a car containing only State traffic a switchman is injured; or, again, that such carrier is operating, on its line of road on which trains containing interstate traffic are operated, a train made up entirely of cars containing only intrastate traffic and that on such train a brakeman is injured; could it be said, in either of such cases, that the employment of such brakeman or switchman had no relation to interstate commerce, and that he was not within the spirit and object and purpose of the statute? And could it be said that a careful selection of such employees, a close and careful supervision of them, and a rigid enforcement of their duties, and the taking of proper precautions for their safety were not of vital importance in securing the safety of life, person, and property in interstate commerce?

It may be well in this connection to call attention to what Mr.

Justice Brewer, in Baltimore and Ohio Railroad *v.* Baugh (149 U. S., 368), at page 378, says. After referring to the authorities holding that the question of the liability of a railroad company for injuries to its servants is a matter of general and not of local law, which the court would, in the absence of express statute on the subject, determine for itself, he continues:

> * * * There is no question as to the power of the States to legislate and change the rules of the common law in this respect as in others; but in the absence of such legislation the question is one determinable only by the general principles of that law. Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the States is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution. To-day the volume of interstate commerce far exceeds the anticipation of those who framed the Constitution, and the main channels through which this interstate commerce passes are the railroads of the country. Congress has legislated in respect to this commerce not merely by the interstate commerce act and its amendments (24 Stat., 379, c. 104), but also by an act passed at the last session, requiring the use of automatic couplers on freight cars. (Public Acts, 52d Cong., 2d sess., c. 113.) The lines of this very plaintiff in error extend into half a dozen or more States, and its trains are largely employed in interstate commerce. As it passes from State to State must the rights, obligations and duties subsisting between it and its employees change at every State line? If to a train running from Baltimore to Chicago it should, within the limits of the State of Ohio, attach a car for a distance only within that State, ought the law controlling the relation of a brakeman on that car to the company to be different from that subsisting between the brakeman on the through cars and the company?

It would seem to be clear that it is of the first importance that Congress should be able to regulate the liability of such common carrier to all such employees.

The fact that a common carrier engaged in interstate commerce may also be engaged in intrastate commerce, using therein in whole or in part the same means and agencies, can not defeat the power of Congress to regulate such carrier. The regulation of intrastate commerce which may result in such a case (if indeed in such case there can be said to be any regulation of intrastate commerce by such an act as this) is due to the fact that the carrier is at the same time and with the same means and agencies engaged in both kinds of commerce; and it seems to me that it could not possibly be said that because the legislation of Congress may operate upon intrastate commerce on account of the carrier being thus engaged in both kinds of commerce it must be declared unconstitutional, and thus the power of Congress defeated. The cases cited show that the States may enact legislation of the kind here in question when Congress has not already spoken, and that such legislation will be valid, although it may affect interstate commerce. Is it possible, then, if such legislation is within the power of Congress as a regulation of interstate commerce, that Congress can not exercise that power as to those engaged in

such commerce merely because at the same time and with the same means and agencies they are engaged in intrastate commerce? The question, it seems to me, answers itself.

In considering what was said in Johnson *v.* Southern Pacific Company, *supra*, as to the character of the car being local only and not actually engaged in interstate movement, it must be borne in mind that the act there being considered was that of March 2, 1893, which was by its terms restricted in its application to cars "used in moving interstate traffic;" but there are clauses and expressions in the opinion which might be interpreted to indicate that if the act had been as broad as the one here under consideration, it would not have been necessary to consider that question at all, and that it would have made no difference as to whether the car was being used in moving interstate traffic or not.

The act was amended by the act of March 2, 1903 (32 Stats., 943), which provided that the provisions of the former act should be held to apply to "all trains, locomotives, tenders, cars, and similar vehicles *used on any railroad engaged in interstate commerce.*"

In U. S. *v.* Great Northern Ry. Co. (145 Fed., 438), the court had under consideration the latter act, and Judge Whitson, in an opinion in which I entirely concur, held that it applied to all cars regularly used on any railroad engaged in interstate commercce not only while actually in use in such commerce, but at all times when in use on such road.

The court said:

> The allegations of the sixth cause of action are that the defendant used on its line of railroad in Hillyard, in the State of Washington, a locomotive engine in moving a car containing interstate traffic, consigned from St. Cloud, in the State of Minnesota, to Hillyard, in the State of Washington, when the coupling and uncoupling apparatus of the locomotive was out of repair and inoperative. The sufficiency of these several allegations is challenged upon the sole ground that it does not affirmatively appear that the cars and locomotive were being used in interstate traffic, for the reason that reliance must be made upon the allegations that they were used only in the State of Washington. Having reference to the constitutional powers of Congress, the argument is that a common carrier is not affected by the legislation which the plaintiff would invoke, because it does not apply to traffic within the States.
>
> The title of the act of 1893 fully reflects the legislative intent as expressed in the act, and it is manifest that the purpose in view was the regulation of commerce between the States by requiring common carriers to conform to certain requirements regarded as essential to the safety of employees and passengers. To sustain the demurrer would be to hold that it is beyond the power of Congress to control the instrumentalities through which interstate commerce may be carried on. But the prerogative necessarily carries with it the authority to prescribe the rules and regulations which shall apply to those engaged in it. Illustrations of the futility of any effort on the part of Congress to exercise its constitutional powers in this regard, if the contention made by the defendant can be sustained, are not far to seek. An interstate carrier might haul traffic from one State to another, there transfer it, and from thence transport it, with-

out any of the safety appliances provided by law. If it be answered that this would be an evasion of the law, the result is susceptible of further illustration. Cars containing State traffic could be commingled with those containing interstate traffic, and thus defeat the purposes of the legislation upon the subject. The effect of this would be to endanger the train engaged in interstate traffic. Again, a carrier could use trains engaged entirely in State traffic upon its lines, without the requisite equipment, which might result in injury to passengers by coming in collision with a train engaged in interstate traffic. *It is the carrier which the acts seek to regulate, and it is by this method that Congress has undertaken to bring the matter under control.*

As said by Mr. Justice Harlan in the Lottery case, *supra:*

It is to be remarked that *the Constitution does not define what is to be deemed a legitimate regulation of interstate commerce.* In Gibbons *v.* Ogden it was said that the power to regulate such commerce is the power to prescribe the rule by which it is to be governed. But this general observation leaves it to be determined, when the question comes before the court, whether Congress in prescribing a particular rule has exceeded its power under the Constitution. While our Government must be acknowledged by all to be one of enumerated powers (McCulloch *v.* Maryland, 4 Wheat., 316, 405, 407), the Constitution does not attempt to set forth all the means by which such powers may be carried into execution. It leaves to Congress a large discretion as to the means that may be employed in executing a given power. "The sound construction of the Constitution," this court has said, "must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." (4 Wheat., 421.)

In an able article on the act here in question in the Central Law Journal of October 12, 1906, volume 63, page 284, cited by counsel here and very largely quoted from, the authors say:

The general and sweeping terms "every common carrier," "any of its employees," "any of its officers, agents, or employees," "all instrumentalities," "any common carrier," and "any employee" must establish the proposition that there was but one idea in the mind of Congress, namely, that as to commerce there shall be no States.

To say that because Congress, as a regulation of interstate commerce, and for the purpose of promoting the public welfare by protecting life and person therein, has seen fit to abolish or modify certain rules of decision founded on the common law upon considerations of public policy, in reference to those engaged in such commerce, it has thereby in effect meant that as to commerce there shall be no States, seems to me to be very extreme, if not absurd. The plain answer to any such assertion is that a person or corporation engaged in both interstate commerce and intrastate commerce, and using therein the same means and agencies, and employing those whose employment relates to such interstate commerce or to such means and agencies, must submit to such conditions as that branch of

the Government to which plenary power over such commerce has been given by the Constitution may prescribe, even though such conditions may affect the intrastate commerce in which such person or corporation is engaged.

In the same article its authors seem to look upon the changes made by this act in the fellow-servant rule, the contributory-negligence rule, the rule as to the freedom of a carrier to contract with its employees concerning its liability for an injury to an employee, and the removal of the limit to the amount of recovery for an injury resulting in death, so often prescribed by State statutes, as startling and dangerous. They do not so impress me. I think it has come to be generally recognized that the reasoning of the cases in which the fellow-servant rule has been laid down by the courts has, in view of modern methods and the many dangerous mechanical means and appliances used in almost every branch of modern industry, lost much, and in some cases all, of its force. I think it may be fairly asserted that the contributory-negligence rule, as laid down and applied by the courts, is, in view of modern conditions, certainly as applied to those engaged in certain occupations, a harsh, cruel, and unjust rule, and ought long since in the furtherance of justice and in the interest of humanity to have been greatly modified.

It has never been the rule in admiralty, to which one of the text-books on the Law of Negligence refers as being certainly nearer ideal justice, "if juries could be trusted to act upon it." This act at least leads in the direction of the admiralty law, and certainly if a rule is an ideal one its adoption should be striven for in any intelligent judicial system, and even if it were admitted that juries could not be trusted to act upon it, to which I do not at all agree, that would not be a condemnation of the rule, but of a part of that system of jurisprudence which has come down from our forefathers, and which is, and let us devoutly hope always will be, firmly rooted in our Constitution and laws. And is it not absurd that a common maximum standard should be established to measure the value of the lives of men to their families, especially when that standard is as low as some of the legislatures have fixed it? It would seem that the value of the life of a man to his family, or to those dependent upon him, should be determined, as all other damages are determined, by the particular circumstances of each case. And there are substantial reasons why an employer, especially one engaged in certain occupations, should not be permitted to relieve himself by contract with his employees from liability for injuries caused by his negligence or the negligence of his other employees.

I do not think that the Trade-mark cases (100 U. S., 82) or Illinois Central Railroad Company *v.* McKendree (27 Sup. Ct. Rep., 153), or any of that line of cases are applicable to the question now under

consideration. This opinion is already too long, and I can therefore only review the Trade-mark case. A careful consideration of that case will, I think, not only not defeat the conclusion which I have reached, but will tend to strengthen it.

That decision was rendered in the consideration of indictments brought under the purely penal sections of the trade-mark statute. Congress passed that statute upon the manifest assumption that the whole subject of trade-marks was a matter of national control under that clause of the Constitution providing that Congress shall have power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." There was therefore no possible room for the contention that Congress intended that the law should be applicable to those trade-marks only which were used in interstate commerce. And in the sixth circuit the law was pronounced constitutional in a case on which the question was argued and decided upon that clause of the Constitution, and in which the opinion was advanced that it is the only provision by which the authority of Congress on the subject of trade-marks is conferred. That contention, however, was not insisted upon by the Attorney-General in the Trade-mark cases. He based his main argument upon the commerce clause of the Constitution. The court, after considering the power of Congress to deal with the subject under the clause above quoted, and deciding adversely, to such power, went on to consider the power of Congress to deal with the subject under the commerce clause of the Constitution.

The court refused to decide the question whether the trade-mark bears such a relation to commerce in general terms as to bring it within Congressional control when used or applied to the classes of commerce which fall within that control. The decision was that when Congress undertakes to enact a law which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law or from its essential nature that it is a regulation of commerce with foreign nations or among the several States or with the Indian tribes; that if not so limited it is in excess of the power of Congress; that the act there under consideration was not so limited; that if its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between the citizens of the same State, it is obviously the exercise of a power not confided to Congress; that if there is no recognition of this principle, it is invalid; that it was manifest that no such distinction was to be found in that act, but that its broad purpose was to establish a universal system of trade-mark registration for the benefit of all who had already used a trade-mark or who wished to adopt one in the

future, without regard to the character of the trade to which it must be applied or the residence of the owner, and that it was therefore invalid. The court says:

The question, therefore, whether the trade-mark bears such a relation to commerce in general terms as to bring it within Congressional control *when used or applied to the classes of commerce which fall within that control* is one which, in the present case, we propose to leave undecided. We adopt this course because when this court is called on in the course of the administration of the law to consider whether an act of Congress or of any other Department of the Government, is within the constitutional authority of that Department, a due respect for a coordinate branch of the Government requires that we shall decide that it has transcended its powers only when that is so plain that we can not avoid the duty.

In such cases it is manifestly the dictate of wisdom and judicial propriety to decide no more than is necessary to the case in hand. That such has been the uniform course of this court in regard to statutes passed by Congress will readily appear to anyone who will consider the vast amount of argument presented to us assailing them as unconstitutional, and he will count, as he may do on his fingers, the instances in which this court has declared an act of Congress void for want of constitutional power.

Governed by this view of our duty, we proceed to remark that a glance at the commerce clause of the Constitution discloses at once what has been often the subject of comment in this court and out of it, that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes. While bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress.

When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, *it is reasonable to expect to find on the face of the law*, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. *If not so limited*, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress.

We find no recognition of this principle in the chapter on trade-marks in the Revised Statutes. *We would naturally look for this in the description of the class of persons who are entitled to register a trade-mark, or in reference to the goods to which it should be applied. If, for instance, the statute described persons engaged in a commerce between the different States, and related to the use of trade-marks in such commerce*, it would be evident that Congress believed it was acting under the clause of the Constitution which authorizes it to regulate commerce among the States. So if, when the trade-mark has been registered, Congress had protected its *use on goods sold by a citizen of one State to another, or by a citizen of a foreign State to a citizen of the United States*, it would be seen that Congress was at least intending to exercise the power of regulation conferred by that clause of the Constitution. *But no such idea is found or suggested in this statute.* Its language is—

"Any person or firm domiciled in the United States, and any corporation created by the United States, or of any State or Territory thereof," or any person residing in a foreign country which by treaty or convention affords similar privileges to our citizens, may by registration obtain protection for his trade-mark. *Here is no requirement that such person shall be engaged in the kind of commerce which Congress is authorized to regulate.* It is a general declaration that *anybody in the United States*, and anybody in any other country which permits us to do the like, may, by registering a trade-mark, have it fully protected. So, while the person registering is required to furnish "a statement of the class, of merchandise, and the particular description of the goods comprised in such class, by which the trade-mark has been or is intended to be appropriated," *there is no hint that the goods are to be transported from one State to another, or between the United States and foreign countries.* Section 4939 is intended to impose some restriction upon the Commissioner of Patents in the matter of registration, *but no limitation is suggested in regard to persons or property engaged in the different classes of commerce mentioned in the Constitution.* The remedies provided by the act when the right of the owner of the registered trade-mark is infringed, *are not confined to the case of a trade-mark used in foreign or interstate commerce.*

It is therefore manifest that no such distinction is found in the act, but that its broad purpose was to establish a universal system of trade-mark registration for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, *without regard to the character of the trade to which it was to be applied or the residence of the owner*, with the solitary exception that those who resided in foreign countries which extended no such privileges to us were excluded from them here.

The statute here under consideration discloses on its face that it is intended as a regulation of interstate and foreign commerce, being expressly confined to common carriers engaged in such commerce. The purpose of the act is not to establish a regulation applicable to all trade, to commerce at all points, but simply to establish a regulation of interstate and foreign commerce. It is not designed to govern commerce wholly between citizens of the same State, but simply to protect interstate commerce. Local or intrastate commerce, if affected at all by it, is only affected because the carrier may be at the same time and with the same means and agencies engaged in interstate commerce. If the act applied to all common carriers, irrespective of the character of commerce in which they might be engaged, it would come within the rule announced in the Trade-mark cases. But we find on the face of the law that it is expressly confined to common carriers engaged in interstate commerce, over which, under the authorities cited, Congress has paramount and exclusive control whenever it chooses to exercise its power. All these considerations distinguish and differentiate it from the act which was under consideration in the Trade-mark cases.

That Congress has since cured the defect in the former trade-mark laws, by providing that they shall apply to trade-marks used in commerce with foreign nations, or among the several States, or with Indian tribes (U. S. Stats., vol. 33, p. 724), would seem to indicate

at least that the members of the Judiciary Committees in the two Houses of Congress, composed as they are of lawyers of great ability, have placed the same interpretation upon the decision in the Trade-mark cases as that indicated above.

As to the McKendree case, it is to be observed that the order of the Secretary there being considered undertook "to make a stringent regulation with highly penal consequences," single in character, and including commerce wholly within the State. The order was not limited to interstate commerce. It was a regulation as to the transportation of cattle from one side of a line within a State to the other side of said line, and it applied "to all cattle transported from the south of this line to parts of the United States north thereof." "A party prosecuted for violating this order would be within its terms if the cattle were brought from the south of the line to a point north of the line within the State of Tennessee." It therefore included cattle transported wholly within the State of Tennessee from points south of the line to points north of it, as well as those which came from or were going to points outside of the State. It applied to all who might transport such cattle, whether engaged in interstate commerce or not. In other words, it was in no way limited to interstate commerce. What I have said, therefore, in relation to the Trade-mark cases is equally applicable to this case.

Again, let us remember that it is *the carrier*, one engaged in interstate commerce, which the act here in question regulates in relation to its duty to its employees, and that if it may be said (as I do not think it can be) to regulate intrastate commerce by reason of the fact that it may apply to an employee who at the time of his injury is engaged upon intrastate traffic, it is because of the manner or method in which the carrier conducts its business, combining or commingling its interstate with its intrastate commerce. The act here in question is directed to common carriers engaged in interstate or foreign commerce, and over such carriers Congress has plenary power.

In the construction of a statute the inquiry always is, What was the legislative intent? In the Trade-mark cases it was held that the act in question clearly indicated the legislative intent to embrace all trade-marks without respect to the character of the commerce in which they were used. In the McKendree case it was held, first, that the act, if otherwise valid, evidenced no intent on the part of Congress to authorize the Secretary to promulgate the rule there involved, and, second, that the rule on its face carried with it no suggestion that the Secretary intended thereby anything other or different from the plain import of its terms; that he evidently intended it to apply to all commerce, and that it was therefore invalid.

This act on its face relates to carriers engaged in interstate commerce. It extends to all such carriers. It extends to no others. Its fair meaning and interpretation is that it applies to all those employees of such carriers, and to those only, who have some relation to such commerce or to the means and agencies employed therein. Cases may possibly arise where a carrier engaged to some limited extent in interstate commerce may not be an interstate carrier within the meaning of this act, as respects a particular employee, or as respects the circumstances of some particular case. That remains to be declared when the case arises. Extreme cases which may have no existence, and which may never exist, are not to be conjured up for the purpose of defeating the obvious intention of Congress. Extraordinary situations are usually not in the minds of the lawmakers, and legislation is not to be held bad with reference thereto. If the general purpose of the law, as fairly indicated by its terms, is within Constitutional limits, it will not be defeated by applying to it the test of some extreme case, possibly within the literal provisions of the act, but entirely beyond its spirit and meaning as a whole.

In the foregoing discussion reference has been made principally, if not altogether, to railroads engaged in interstate commerce, but the same principles and the same reasoning would apply as well to other common carriers engaged in such commerce.

I am therefore of the opinion that the second ground on which the objection to the constitutionality of this act is based is not well taken.

The contention that the act is void because it denies the equal protection of the laws is, I think, without merit. It is beyond question that a State legislature can change the common-law rules determining the liability of employer to employee as to all employers within its jurisdiction, and that such legislation would not be contrary to the fourteenth amendment because the danger to employees is greater in some occupations than in others, or because in the same occupation some of the employees may be exposed to greater danger than others. It was the evident intention of Congress that the act here in question should embrace all employers and all of their employees to whom its power under the commerce clause of the Constitution extends, and, considering the extent of that power, the fact that it applies to all such employees, irrespective of the danger of their particular employments, no more affects its constitutionality than would such fact affect the constitutionality of a similar State enactment whose provisions were made applicable to all employers under its jurisdiction.

But if the foregoing position is unsound, and if this Congressional enactment is subject to the equal-protection paragraph of the fourteenth amendment, I am still of the opinion that, bearing in mind the object of the statute, the peculiar character of the business of the carriers affected and the public nature of their functions, and

the fact that they are all treated alike under similar circumstances and conditions, it is valid, because the classification therein made is within the range of the legislative discretion and is practical and not palpably arbitrary. (Missouri Pacific Ry. Co. *v.* Mackey, 127 U. S., 205; Tullis *v.* Lake Erie and Western R. R., 175 U. S., 348; St. L., I. M. and S. Ry. Co. *v.* Paul 173 U. S., 404.)

Nor can it be said that for this reason the law is harsh and inequitable, because where the danger is less the liability will less frequently arise, and if there be practically no danger, there will be practically no liability. But if it is, that would furnish no just cause for declaring it invalid. The remedy would lie not with the courts, but with Congress.

In Lottery cases, *supra*, Mr. Justice Harlan says:

> But, as often said, the possible abuse of a power is not an argument against its existence. There is probably no governmental power that may not be exerted to the injury of the public. If what is done by Congress is manifestly in excess of the powers granted to it, then upon the courts will rest the duty of adjudging that its action is neither legal nor binding upon the people. But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in Gibbons *v.* Ogden, when he said: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

The contention that the act violates the tenth amendment of the Constitution, is but another way of saying that it is not within the power of Congress under the commerce clause. And I think that no argument is necessary to refute the contention that it violates the fifth and seventh amendments.

I am therefore of the opinion that the act in question is constitutional and valid, and the demurrer must be overruled.

I am not unmindful of the fact that the foregoing opinion, in so far as it relates to the commerce clause of the Constitution, is in conflict with opinions already pronounced by other Federal judges of the highest learning and ability, and I have approached and considered the questions involved with a just and real respect for decisions supported by such authority. But, feeling that I must exercise my own understanding and judgment with that independence which is expected from this department of the Government, I find myself unable to reach any other conclusions than those above indicated.

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IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA.

LUCY SNEAD, ADMINISTRATRIX, v. CENTRAL OF GEORGIA RAILWAY COMPANY.

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW—FINAL ARBITER.—Whenever the rights of a party may be affected by a particular governmental act, whether it be an act of Congress or of the State legislature, or of an executive or judicial functionary, either of the State or of the United States, if it be capable of submission to a court having jurisdiction, the final and common arbiter of the constitutional question is the supreme judicial authority of the courts of the United States.
2. SAME—PRESUMPTION—REASONABLE DOUBT.—There is a settled presumption in favor of the validity of every legislative act. Every reasonable judicial doubt must be resolved in favor of the law. The courts will decide that Congress has transcended its powers only when that is so plain that they can not avoid the duty.
3. SAME—DUTY OF COURTS.—No higher duty rests upon the courts of the United States than to enforce the will of the legislative department of the Government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution.
4. COMMERCE.—Definitions given.
5. SAME—INSTRUMENTALITIES.—Employees of persons or corporations engaged therein are instrumentalities of commerce. Restrictive or benevolent regulation of those employees is within the power of Congress, which may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed in the Constitution.
6. POWER OF CONGRESS.—Congress alone by legislation may occupy the whole field of interstate commerce.
7. SAME.—Illustrations of the exercise of this power by Congress enumerated, making clear that the words "to regulate" import the right and power to *enact laws*, and not merely to make rules and regulations.
8. SAME.—When a corporation or other person engages in interstate or foreign commerce, *eo instanti*, the men who control it, and the corps of its employees, become subject to all those legitimate means which Congress may select for its regulation.
9. NEGLIGENCE OF FELLOW-SERVANT.—Reason for rule denying to an employee the right to recover for injuries sustained by the negligence of a fellow-servant, in view of modern conditions, pronounced archaic.

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10. INTERSTATE COMMERCE.—The purpose of Congress being legitimate, and expressly relating to employees engaged in interstate or foreign commerce, it is immaterial to the validity of the act that somewhere in its operation it may have a casual or contingent effect upon the domain of State legislation.
11. SAME.—Trade-Mark Cases (100 U. S., 82); and Illinois Central Railroad Company *v.* McKendree, decided December 17, 1906 (not yet published), distinguished from the act in question.
12. NATIONAL AND STATE AUTHORITY.—The Government of the United States, within the scope of its powers, operates upon every foot of territory in its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Here, however, no right proper to the State, or any of its instrumentalities of government, is drawn in question.
13. VALIDITY OF STATUTE—DUE PROCESS OF LAW.—Here, there is no deprivation of due process of law. Missouri Pacific Railroad Company *v.* Mackey (127 U. S., 205) followed.
14. CONSTITUTIONALITY OF STATUTE.—The act of Congress, approved June 11, 1906, entitled "An act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employees," held to be constitutional.

John Randolph Cooper and Alexander Akerman, for plaintiff.
Lawton and Cunningham, for defendant.

(Decided March 25, 1907.)

SPEER, *Judge*.

The plaintiff is the widow and administratrix of Walter Snead, lately an employee of the Central of Georgia Railway Company. She is a citizen of Georgia, and has brought an action against the Central of Georgia Railway Company, a Georgia corporation. Her claim is for damages occasioned by the death of her husband. He was a bridgeman employed by the defendant company and at the time of his death was engaged in repairing a bridge upon a line of its railroad in the State of Alabama. It is alleged that through the negligence of other employees of the company he was knocked from the bridge to the ground below and sustained injuries which resulted in his death. No diversity of citizenship is alleged, and the jurisdiction of the court is invoked solely upon the authority of the act of Congress approved June 11, 1906, entitled "An act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employees."

This recent and most important legislation is popularly known as the "Employer's Liability Act." The language of that act material for our consideration is as follows:

That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another or between any Territory or

Territories and any State or States, or the District of Columbia, or with foreign nations or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

SEC. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death the fact that the employee have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

SEC. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: Provided, however, That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee or, in case of his death, to his personal representative.

To the declaration of the plaintiff the defendant has demurred upon several grounds:

First. Because the act is not a regulation of commerce within the meaning of the commerce clause of the Constitution.

Second. Because said act, if it be a regulation of commerce, is not limited to commerce with foreign nations, or among the several States or with the Indian tribes, but extends as well to intrastate commerce.

Third. Because interstate and intrastate employees are so commingled by this act that it is impossible to make it apply only to interstate employees, unless the court reads into the act something which Congress has not put there, and this the court may not do.

Fourth. Because it is a violation of the fifth amendment to the Constitution, which provides that "no person shall be deprived of life, liberty, or property, without due process of law.

This demurrer draws in question the power and authority of the National Congress to enact a law, which, in the minds of the plaintiff and her counsel, has justified her action. It is, perhaps, difficult to magnify unduly the significant and consequential import of the question thus presented. Every corporation and person in the States and Territories engaged in commerce between the States, or between the States and foreign nations, may be profoundly concerned. More immediate, perhaps, is the interest of more than a million of our countrymen, the employees of the railway and other corporations, who serve the public and their employers in the mightiest, and, after

agriculture, the most indispensable among the physical labors of civilized men. The settled policy of a great nation on this stupendous topic is at stake; the validity of a deliberate enactment of the National Legislature is drawn in question for determination by the final arbiter of the American system of government.

Where reposes the august power of such final arbitrament? On a previous occasion I have attempted to answer. "Whenever the rights of the citizen may be affected by a particular governmental act, whether it be an act of Congress or of the State legislature, or of an executive or judicial functionary, either of the State or of the United States, if it be capable of submission to a court having jurisdiction, the final and common arbiter of the Constitutional question is the supreme judicial authority of the courts of the United States. In such cases the final decision of that authority is binding upon all the people, all the States, and all the departments of the General Government. It is this magnificent significance of judicial power and usefulness which dignifies our Government over that of every other nation." Lord Chatham declared of the British constitution: "The poorest man may in his cottage bid defiance to all the forces of the Crown; it may be frail, its roof may shake, the wind may blow through it, the storm may enter, but the King of England can not enter; all his forces dare not cross the threshhold of the ruined tenement."

But not so of the legislative power, for, said Mr. Phelps in his eulogy of our Supreme Court, "The great orator could go no further: he could not say the British Parliament might not enter the home of the subject, for all the judges of England are powerless in the face of an act of Parliament, whatever it may be. It was reserved for the American Constitution to extend the judicial protection of personal rights, not only against the rulers of the people, but against the representatives of the people. And," continued that great American lawyer, "judges will be appointed and will pass away, one generation rapidly succeeding another. But whoever comes and whoever goes, the court remains. Strong in its traditions, consecrated by its memories, fortified with the steadfast purpose of the profession that surrounds it, anchored in the abiding trust of its countrymen, the great court will go on—and still go on, keeping alive through many a century that we shall not see the light that burns with constant radiance upon the high altar of American constitutional justice." (Lectures on the Constitution, Speer, J. W. Burke Co., Macon, Ga., pp. 101, 2, 3.) While this is true, and while it is also true, as De Tocqueville declared, that "a more imposing judicial power was never constituted by any people," in all our history the occasions when the action of Congress or of the Executive have been declared unconstitutional are singularly and happily infrequent.

This is indeed inevitable from the division and coordination of our governmental power. There is a settled presumption in favor of the validity of every legislative act. This, perhaps, was originally ascribable to the lofty and even plane of intelligence, patriotism, and statesmanship discoverable from the earliest period of our history in the National Legislature.

It is probable that in other times, a few great men of distinguishing individuality were more conspicuous in that body than at present. It is also probable that at no other period has there been an average plane of intelligence, of careful education, of knowledge of historical information, or familiarity with present conditions, and of keen perspicacity of those measures essential for the welfare of the people than that which exists to-day in our Congress. Nor is it less persuasive of the validity of National Legislation that the Executive and his constitutional advisers are regarded as worthy prescient colabrers with Congress in the recommendation and approval of such measures. Whatever the reason, certain it is that the rule exists that courts will not adjudge an act of Congress invalid unless in their judgment its violation of the Constitution is clear, complete, and unmistakable. Every reasonable judicial doubt must be resolved in favor of the law. Even where the legislation is annulled, the Supreme Court has given unequivocal expression to this doctrine. In the Trade-Mark Cases (100 U. S., 96), Associate Justice Miller, rendering the opinion, observed.

> When this court is called on in the course of the administration of the law to consider whether an act of Congress or of any other Department of the Government is within the constitutional authority of that Department, a due respect for the coordinate branch of the Government requires that we shall decide it has transcended its powers only when that is so plain that we can not avoid the duty. Justice Miller further observed that one "will count, as he may do on his fingers, the instances in which this court has declared an act of Congress void for want of constitutional power."

And again in case of the United States *v.* Harris (116 U. S., 635) Mr Justice Wood said:

> Proper respect for a coordinate branch of the Government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated.

The principle is otherwise expressed in the famous case of the Northern Securities Company *v.* United States (193 U. S., 350). There Mr. Justice Harlan declares:

> No higher duty rests upon this court than to enforce, by its decrees, the will of the legislative department of the Government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution.

It is obvious that these cardinal principles of constitutional determination must be steadily held in mind while the question here involved is under consideration.

The impeachment of this legislation is based upon the following material contentions: First, because the subject-matter sought to be regulated is not commerce, or the law a proper regulation of such commerce; and second, because it involves an unwarrantable effort to regulate intrastate commerce, over which Congress has no power.

A superficial conception of the term "commerce" may lead to conclusions as fallacious as they are inimical to the proper solution of these great questions about which the country is now concerned. The term, as used in the Constitution, has been repeatedly interpreted by the courts. Said Chief Justice Marshall, in Gibbons *v.* Ogden (9 Wheat, 1):

> Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.

More detail is afforded by the definition of Mr. Justice Johnson in his concurring opinion in the same case (p. 229):

> Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange become commodities, and enter into commerce; the subject, the vehicle, the agent, and the various operations become the objects of commercial regulation.

"Commerce," declared Mr. Justice Field in Welton *v.* State of Missouri (91 U. S., 280), "is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities * * *." Additional definitions may be found in Smith *v.* Turner (7 How., 401), State Freight Tax Case (15 Wall., 275), Chicago R. Co. *v.* Fuller (17 Wall., 568), Pensacola Tel. Co. *v.* Western Union Tel. Co. (96 U. S., 9), Mobile Co. *v.* Kimball (102 U. S., 702), Gloucester Ferry Co. *v.* Pennsylvania (114 U. S., 204), Addyston Pipe Co. *v.* U. S. (175 U. S., 214). It follows that from Chief Justice Marshall we learn that it means commercial intercourse in all its branches, and that it is regulated by prescribing rules for carrying on that intercourse. It is very clear that such rules can be corrective in a restricted sense only, if confined to the material commodities transported, sold, or exchanged. This is not enough. They must operate on men. That they affect passengers can scarcely be denied. This has been established by legislation and by the courts; but the great Chief Justice extends the meaning of the word to all its branches. How futile and unworthy the attention of Government would be this provision of the organic

law did it fail to affect the individuals for whom, by whom, and at whose instance commercial intercourse is carried on.

The persons who are concerned or affected by commerce may be classified as follows: (1) Persons as commodities of commerce, such as passengers and immigrants; (2) persons who are the instrumentalities of commerce, such as pilots, engineers, and mariners on vessels, railway operatives on land, and others whose business is interstate or foreign commerce; (3) persons who thus employ and set commerce in motion.

These are the men who create and continue to operate the great lines or channels of commercial intercourse.

It is, then, wholly impossible in a constitutional sense, or in legislative contemplation, to separate the men who are the instrumentalities and active agents of that commerce which the National Government may control from the restrictive or benevolent regulation within the purview of that power which the framers of the Constitution conferred upon Congress. In a word, the commodities of commerce, whether animate or inanimate, can not be moved for the trade of the world without men. To direct and to protect such men is within the domain of legislative regulation. The employees of those persons or corporations which are engaged in interstate or foreign commerce are, then, within the regulative power of Congress, and that power, said Chief Justice Marshall, " is to prescribe the rule by which commerce is to be governed and, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed in the Constitution." In behalf of such employees the law under consideration was enacted.

It should be noted also that the courts have universally held that the power to regulate embraces all the instrumentalities by which commerce may be conducted. (Welton *v.* Missouri, supra; Pacific Coast S. S. Co. *v.* Board of R. R. Comrs., 18 F. 11; Sherlock *v.* Alling, 93 U. S., 104; U. S. *v.* Joint Traffic Ass'n., 171 U. S., 569; Hopkins *v.* U. S., 171 U. S., 597.) Said Mr. Justice Field, in Gloucester Ferry Co. *v.* Pennsylvania, (supra, p. 203):

> The power to regulate * * * is the power to prescribe the rules by which commerce shall be governed—that is, the conditions upon which it shall be conducted; to determine when it shall be free; and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged.

The power to regulate applies as well to traffic on water as to traffic on land, and while some regulations have been ascribed to the law of the admiraty, which is of full force not only upon the seas but on the interior lakes and navigable waterways of the United States, it is yet

clear that much legislation for the direction and protection of the instrumentalities of this maritime trade finds its authority in the commerce clause which we are discussing. Said Mr. Justice Clifford, in State Tonnage Tax cases (12 Wall., 216):

> Unquestionably the power to regulate commerce includes navigation as well as traffic in its ordinary signification, and embraces ships and vessels as the instruments of intercourse and trade as well as the officers and seamen employed in their navigation.

This language is reiterated in Hall *v.* De Cuir (95 U. S., 494), and in other cases. The officers and seamen then are deemed and held to be as much the instruments of such intercourse and trade as the ships and vessels.

It is also established that the powers thus granted are not confined to the instrumentalities of commerce as they were known or in use when the Constitution was adopted. In the Pensacola Telegraph Co. v. Western Union Telegraph Co. (96 U. S., p. 9) it was said by Chief Justice Waite:

> They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times and under all circumstances.

And said Mr. Justice Brewer in the famous case In re Debs (158 U. S., 591):

> Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown—the railroad train and the steamship. The Constitution has not changed. The power is the same, but it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.

It is true that the extension of the elastic but indestructible powers to regulate interstate and foreign commerce has been slow and gradual. It has, however, kept pace with the evolution of the great force of civilization it was designed to control. It has been as steadily resisted by that school of constructionists who believe, as stated by Justice Miller in Ex parte Yarborough (110 U. S., 658), "in the old argument often heard, often repeated, but in this court never assented to, that when the question of the power of Congress arises the advocate of the power must be able to place his finger upon words which expressly grant it." It is equally true that the conservative efforts of the skillful logicians of this school have been of

undoubted service to the country. They have obliged the most careful contemplation of the legality and the wisdom of every advancing step. To change the metaphor the vis inertia they have exerted has performed the salutary functions of a brake upon the car of progress. On occasion, possibly, the brake has been applied when the car was heavily freighted with the hopes of the nation and toiling painfully uphill, but its progression has ben found irresistible. An illustration may be found in the gradual but expanding utilization of the commerce clause in its application to the instrumentalities of navigation. In the *Lottawanna* (21 Wall., 558), on this topic it was held:

> Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrollment, license, and nationality of ships and vessels; the method of recording bills of sales and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of ship owners for the negligence and misconduct of their captains and crews, and many other things of a character truly maritime.

Here also Mr. Justice Bradley delivered the opinion of the court. On page 575 this great jurist speaks of the "uniformity and consistency at which the Constitution aims on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." Pursuant to this power the Congress therefore has prescribed rules which include the control of vessels engaged in commerce, and these are as well applicable to vessels engaged only in intrastate commerce as to those engaged in interstate traffic, in the case of steamboats, the inspection of their hulls and boilers, the licensing of their officers, the carying of prescribed lights and giving and answering prearranged signals, the maintenance of means for the preservation of life, life preservers, life rafts, and the like. In the *Hazel Kirke* (25 Fed. Rep., 607), the necessity of unlimited control is stated:

> Manifestly it is not possible for Congress to fully control and adequately protect the commerce with foreign nations and among the several States when that commerce is pursued by means of vessels navigating the public waters of the United States without controlling the navigation of all vessels navigating such waters, not only those engaged in commerce with foreign nations and among the several States but those engaged in domestic commerce and those engaged in no commerce at all, like the yachts. Accordingly Congress has undertaken to regulate the lights to be carried by all vessels navigating such waters and the courses to be pursued by all vessels meeting upon such waters, and these regulations are supreme and binding upon all vessels. They a.e necessary because only by controlling in those ports the navigation of all vessels navigating such waters can the safe navigation of vessels engaged in interstate and foreign commerce upon such waters be secured.

This control also extends to the control of persons transported in interstate and foreign commerce. That it relates to passengers thus transported will not be denied. It has been held that an act to regulate immigration which levied a duty for every passenger coming from a foreign port to this country is proper under the commerce clause. The Head Money Cases (18 Fed. Rep., 135). It has established qualifications and conditions for masters, engineers, pilots of vessels; it has enacted categorical rules comprehending the rights and duties of seamen and owners of vessels; it has regulated shipping articles, the method of their treatment, and the protection of their health while on board ship. This is established by numerous authorities. (The Barque *Chusan*, 2 Story, 455, 5 Fed. Cas., 20717; The Katie, 40 Fed., 492; 7 Cyc., 461; in re Vessels Owners Towing Company, 26 Fed. Rep., 170.) Said the Supreme Court in Cooley *v.* Board of Wardens (12 Howard, 315):

> When we look to the nature of the service performed by pilots, to the relations which that service and its associations bear to navigation between the several States and between the ports of the United States and foreign countries, we are brought to the conclusion that the regulation of the qualification of pilots, of the modes and times of offering and rendering their services, and of the penalties by which their rights and duties may be enforced, does constitute regulation of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution.

For authorities on this subject see 8 Fed. Stat. Ann., page 408.

If, then, Congress has the established right to control the relative duties of the shipowners and the seamen, both of whom are instrumentalities of commerce, both absolutely essential to its proper and effective conduct, or any conduct, upon what sound reasoning can its control of the rights and liabilities of other men engaged in the transportation by land of the same commerce be denied? The employees of a railroad company are essential instruments to the existence under modern conditions of interstate traffic on land. The locomotive engineers, the firemen, the train hands, the track hands, the conductors, and all the rest are as essential to this traffic as are the masters, pilots, engineers, and sailors to navigation. The power to regulate, as we have heretofore seen, is unlimited in its application to such traffic. How narrow, then, is the contention that this regulation may be extended to the inanimate machinery and commodities engaged and not to the men, without whose services not a wheel would revolve and not an ounce of freight would be transported.

Said Mr. Justice Bradley in Stockton *v.* Baltimore & N. Y. R. Co. (32 Fed., 9):

> With regard to commerce it has been expressly held that it is not confined to commercial transactions, but extends to seamen, ships, navigation, and the appliances and facilities of commerce, and it must extend to this or it would not embrace the whole subject. Under this power the navigation of rivers

and harbors has been opened and improved, and we have no doubt that canals and waterways may be opened to connect navigable bays, harbors, and rivers with each other, or with the interior of the country. Nor have we any doubt that, under the same power, the means of commercial communication by land as well as by water may be opened up by Congress between the different States whenever it shall seem fit to do so through the failure of the States to provide such communication or whenever in the opinion of Congress increased facilities of communication ought to exist.

In the presence of such tremendous physical demonstration of this truth as the transcontinental railways, builded largely from the public resources and chartered by Congress, and the work of constructing the Isthmian Canal, the soundness of the views of that great jurist will scarcely be questioned.

In the subsequent case of California *v.* Pacific Railroad Company (127 U. S., 39), Justice Bradley further observes:

The power to construct or to authorize individuals or corporations to construct national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges it would be without authority to regulate one of the most important adjuncts to commerce. Of course the authority of Congress over the Territories of the United States and its power to grant franchises exercisable therein are and ever have been undoubted, but the wider power was very freely exercised and much to the general satisfaction in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories and employing the agency of State as well as Federal corporations.

This language is approved without reservation and applied to railroads by the Supreme Court in the case of Cherokee Nation *v.* Kansas Railroad (135 U. S., 658). There the court was unanimous and said, Justice Harlan as its mouthpiece:

The question is no longer an open one as to whether a railroad is a public highway established primarily for the convenience of the people and to subserve public ends, and therefore subject to governmental control and regulation

Congress, then, may not only create railroads, pay for their construction and maintenance, but it may control those which are chartered by the States and which engage in the commerce over which the national authority is paramount. Congress alone by legislation may occupy the whole field of interstate commerce. (The Lottery Cases, 188 U. S., 321.) It is true that the States may charter corporations to engage in this business. It is true that Congress by its acquiescence may permit their operation. But when it chooses to act, the authority granted by the State, when in conflict with the national law, is obliterated and the latter is written in letters of enduring light on the page from which the local enactments have been erased. Upon this subject the authorities are numerous. (173 U. S., 297–298.)

A familiar illustration is near at hand. By virtue of State authority several railroads had constructed bridges for their highways across the navigable river upon which this city is situated. The steamboats plying the lower river were thus forbidden access to its wharves. The National Government since its organization had been silent. It finally thought proper to act. The railroads were then informed that unless suitable drawbridges were constructed so that steamers might pass through unhindered their bridges would be removed. In other words, the dormant power of the Constitution was aroused and the railroads, the creatures of the State, whose action had been theretofore lawful, turned the listening ear and caught the words of that mandate and swiftly obeyed.

The creation of the Interstate Commerce Commission, the enactment against arbitrary and discriminating rates, of the antitrust law forbidding combinations in restraint of trade, held directly applicable to railroads, even though chartered by the States, the law denouncing rebates and forbidding passes in interstate traffic, the law forbidding a railroad engaged in such commerce from dealing in commodities like coal, which it transports (Railroad *v.* I. C. C., 200 U. S., 3661). All such legislation culminating in the power exercised by the most recent enactment, entrusting the Commission, which is the agent of Congress, with the power to fix rates, and the bill to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon, enacted in the closing hours of the last session, are familiar illustrations of the exercise of the right and power of Congress to control such commerce. It is not difficult to foresee that this power may speedily be extended to reach and to paralyze the action of those daring financiers who water the stock of corporations engaged in interstate traffic, and who by this perilous expedient not only compel the public to pay interest upon evidences of fictitious values thus created, but endanger the stability of all business by the panics they engender and the calamities they threaten. In the meaning of the commerce clause, it is thus made clear that the words "to regulate" impart the right and power to enact laws, and not merely to make rules and regulations. The necessity for such right and such power, more than all things else, contributed to the very establishment of the Government of the United States itself. Said Chief Justice Marshall in Brown *v.* Maryland (12 Wheat., 444):

> The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the Federal Government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of

things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the several States. To construe the power so as to impair its efficiency would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

This power exists in all the pristine vitality in which it was implanted in the organic law. That law does not profess to enumerate all the means by which its powers may be executed. In the nature of things such enumeration was impossible. Said Chief Justice Marshall in Martin *v.* Hunter (1 Wheat., 326):

The Constitution unavoidably deals in general language. It did not suit the purposes of the people in framing this great charter of our liberties to provide for minute specifications of its power, or to declare the means by which those powers should be carried into execution.

Specification of the means for its proper control have enlarged with the evolution of the nation. In the creation of national banks, in authorizing corporations for the building and maintenance of bridges and highways, in the erection of light-houses, in the annual expenditure of millions for the improvement of the interior waterways, the exterior harbors, and the channels of access thereto, and in many other ways Congress has defined and utilized such means. In the well-known case of United States *v.* Greene and Gaynor (146 Fed. Rep., 803) it was held that the power of Congress to regulate and improve navigable water found its authority under the commerce clause. It follows that when a corporation or other person engages in this commerce eo instanti, the men who control it and the corps of its employees become subject to all of those legitimate means which Congress may select for its regulation.

Nor is the enactment of such measures as that under consideration a novel or unusual power on the part of Government. Our own State, it seems, was the pioneer in a measure of partial relief from that strict rule which was first enunciated in England in 1837 which forbade the recovery by an employee for injuries inflicted by the negligence of a fellow-servant. The Georgia law upon this subject was enacted in 1856 so far as it related to railroads. In 1862 Iowa abolished the fellow-servant bar as to trainmen, and in 1874 Kansas did the same thing. In 1885 the State of Alabama adopted similar legislation, and in 1893 Arkansas qualified the doctrine as to railroad employment. Minnesota followed in 1887. Florida, Ohio, Mississippi, and Texas have modified the doctrine for the benefit of em-

ployees. North Carolina, North Dakota, Massachusetts, Wisconsin, and Minnesota denied its applicability to the operation of railroad trains, and in 1901 Colorado abolished the doctrine in toto. Nor have foreign governments been inattentive to this great and unreasonable injustice to that splendid body of citizenship upon whom so much of the prosperity of the nation must depend. In 1888 England denied its application to those engaged in the operation of railroad trains, and in 1897 made it also inapplicable to many other hazardous employments. In Germany it does not apply to any of the hazardous occupations. In 1869 Austria passed a law making railroad companies liable for all injuries to their employees save where the injury was due to the victim's own negligence. The Code de Napoleon made the employer answerable for all injuries received by his workman and this is still of force in France, in Belgium, and in Holland. Other European countries have from time to time fixed the liability of the master to his servant for damages caused by the negligent act of a fellow servant. It is, however, unhappily true that many States of the Union, notwithstanding the anachronism of the rule, have maintained and still enforce it. But Congress has at length determined that there shall be an uniform law for the protection of that army of more than a million of men engaged in interstate traffic, an army whose courage, decision, patriotism, and intelligence may not be surpassed.

The rule which this legislation abrogates was based upon the contention that the servant contracts for a wage sufficient to protect him against risks incident to the service, and he is in a better position to observe and protect himself against the negligence of his fellow-servant than his employer, and that it will insure better service and less injury if the master be not responsible. The briefest consideration will show how archaic is this reasoning when applied to modern conditions. Take the engineer on the locomotive which drives the lightning express. The complexity of his mighty machinery requires his constant and careful attention. Possibly in the darkness of night, 50 or 60 miles an hour his train thunders along the gleaming rails. His is blind obedience to his orders. Through the mistake or negligence of a fellow-servant, over whose action he has no control, of whose mistake or misconduct he has no knowledge, in an instant he may be hurled to death, or to mutilation indescribable. While this is true, under the law which the act of Congress repeals, it has been held that the relation of fellow-servant existed between the engineer acting as conductor and his fireman; between the common day laborer building a culvert and the engineer and conductor running a train; between the engineer operating one train and the conductor on another train on the same road; between conductor and brakeman on the same train; between the local telegraph operator and fireman upon

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the train; and, in view of these relations, shadowy and intangible as they are, yet justified by the law as it existed, it has been held that the employer was not liable for the death and suffering which resulted.

The law is a progressive science. The rule has long been deemed most unjustifiable. In Labat [on Master and servant, vol. 2, sec. 754] it is declared:

> It does not rest upon any satisfactory bases, logical, social, or economic, and by relegating the injured person to his action against a coemployee, who is, as a general rule, financially irresponsible, leaves him in the great majority of instances without any prospect whatever of obtaining the adequate indemnity."

Such conditions will no longer exist. Said the House committee, in its report:

> Now where the doctrine of fellow-servant is in force no one is responsible for the injury or death of the fellow-servant. The coservant who is guilty of negligence resulting in the injury may be liable, but as a rule he is not responsible. Employees are never held to such strict rules for the safety of his coemployees, because the employer is not bound to pay damages in case of injury. If he were held liable for damages for every injury occasioned by the negligence of his servants, he would enforce the same strict rules for the safety of his employees as he does for the safety of passengers and strangers, he will make the employment of his servant and his retention in the service dependent upon the exercise of higher care, and this will be a strong inducement to the employee to act with higher regard for the safety of his fellow-workmen.

It is, however, urged that the States are adequate to afford all needed relief. It will suffice to say that a majority of them have not done so. An employee of interstate traffic may receive measurable protection from the negligence of his fellow-servant in Georgia, though even here his whole demand is denied if he is himself guilty of any negligence contributory to the injury, however slight. His train rolls across the boundary line of South Carolina or Tennessee and there for the same negligence, the same injury, the same death, he or his wife and children may be denied any and all redress.

But it is additionally objected that he who is engaged in interstate traffic also handles traffic which is intrastate, and this should be held to vitiate the legislation of Congress. By a parity of reasoning this would annul the laws in interior waterway navigation already discussed, it would abolish the Interstate Commerce Commission, and all of those regulations which Congress has enacted for the transportation and business of interstate commerce.

"It will not do," said the Supreme Court, in Wheeling Bridge case (18 How:, 721), "to say that the exercise of an admitted power of Congress conferred by the Constitution is to be withheld, if it appears or can be shown that the effect and operation of the law may incidentally extend beyond the limitation of the power. Upon any such interpretation, the principal object of the framers of the instrument in conferring the power would be sacrificed to the subordinate conse-

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quences resulting from its exercise. In re *The Katie* (40 Fed., 492) it was held, "The purpose of the legislature being legitimate and warranted by the Constitution, it is wholly immaterial to the consideration of its validity that somewhere it has a casual or contingent effect upon the domain of State legislation."

Were this argument sound, the shipment of a crate of pigs from Macon to Griswoldville would annul the power of Congress to control the shipment by the same train of a thousand bales of cotton from Macon en route to Liverpool.

It is true that in support of the contention that the act is an unwarrantable interference by Congress with the trade and traffic between citizens of the same State two decisions of the Supreme Court are cited. These are the Trade-Mark Cases (100 U. S., 82), and Illinois Central Railroad Company *v.* J. U. McKendree, decided December 17, 1906 (not yet published). They are readily distinguishable from the question here. In the former, said Mr. Justice Miller stating the grounds upon which the trade-mark legislation was held unconstitutional (p. 96):

> When * * * Congress undertakes to enact a law which can only be valid as a regulation of commerce it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited it is in excess of the power of Congress.

The acts in question contained no reference whatever, either in terms or by implication, to interstate or foreign commerce, but applied to all trade-marks by whomsoever and for whatever purpose used. And that this was the basis of the decision is clear from the court's reasoning:

> We would naturally look for this in the description of the class of persons who are entitled to register a trade-mark, or in reference to the goods to which it should be applied. If, for instance, the statute described persons engaged in commerce between the different States, and related to the use of trade-marks in such commerce, it would be evident that Congress believed that it was acting under the clause of the Constitution which authorizes it to regulate commerce among the States. * * * But no such idea is found or suggested in this statute.

This language renders obvious the distinction between that case and the one under consideration. Here, "On the face of the law," there is a regulation of interstate commerce. The act relates to employees of common carriers and "describes persons engaged in commerce between the different States." Besides the Trade-Mark case dealt with indictments for alleged crime, and in criminal cases the laws are construed with the utmost strictness against the Government. This is remedial legislation and the opposite rule is adopted.

Nor is the case of Illinois Central Railroad Company *v.* McKendree decisive of the question here in issue. In that case, the Secretary of

Agriculture had adopted a certain quarantine line in the State of Tennessee, under act of Congress "To more effectually suppress and prevent the spread of contagious and infectious diseases of live stock." This order was attacked because it applied to all cattle, to those transported within the State of Tennessee as well as without the State. It was not limited to cattle as a commodity of interstate commerce and this, therefore, rendered it invalid. Mr. Justice Day declares:

> The order in terms applies alike to interstate and intrastate commerce. A party prosecuted for violating this order would be within its terms if the cattle were brought from the south of the line to a point north of the line within the State of Tennessee * * * For aught that appears upon the face of the order, the Secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single and indivisible.

In the case here the act is an express regulation of interstate commerce, limited to the employees of those common carriers who are engaged therein. It operates neither expressly nor impliedly upon employees or carriers in solely intrastate traffic. But even could it be so construed, certainly the power of Congress to control interstate instrumentalities would not be divested, merely because these instrumentalities may be incidentally used as mediums of local commerce. The Wheeling Bridge case supra.

Nor can it be justly contended that any injury will result to any corporation or person engaged in interstate or foreign commerce by the means of redress for injuries thus afforded by the act of Congress. There is no deprivation of due process of law (Mo. Pac. R. R. Co. *v.* Mackey, 127 U. S., 205; McGuire *v.* Chicago, etc., R. R. (Ia.), 108 N. W., 902). It is true that an action like that under consideration presents a controversy arising under the Constitution and laws of the United States. It is also true that the judicial power of the United States extends to such controversy, and jurisdiction is therefore conferred upon the courts of the United States. The judges of those courts will scarcely entertain an argument that this will be injurious to either party litigant. The plaintiff need not seek the court unless he chooses to do so. Its jurisdiction is not exclusive, but merely concurrent.

He may sue for his Federal cause of action, thus created, in the State court. On the other hand, many railroads and other corporations engaged in interstate commerce already remove the actions or suits in which they are parties defendant from the State courts to the courts of the United States. It is within the bounds of possibility that the controlling and influential owners of great railroads, which

traverse those States where no redress at all is afforded to the employee for injuries consequent upon the negligence of a fellow-servant, may regard this legislation as injurious. Be this as it may, Congress has now drawn the whole subject within the boundaries of its Constitutional power. It is seeking to protect the employees who are the instruments and agents of commerce. The Government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. (Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S., 10.)

> It is a principle fully recognized by decisions of the State and Federal courts that, wherever there is any business from which either from the products created or the instrumentalities used, there is danger to life or property it is not only within the power of the States, but it is among their plain duties to make provisions against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable.

This is the language of Mr. Justice Fields, in Nashville, &c., Railway *v.* Alabama (128 U. S., 99), who spoke for the unanimous court This great justice, however, in the same paragraph, also says:

> It is conceded that the power of Congress to regulate interstate commerce is plenary; that as incident to it Congress may regulate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in that commerce, and that such legislation will supersede any State action upon the subject. But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits.

On this subject it would seem that the argument is exhaustive. To the same effect are Smith *v.* Alabama (124 U. S., 473); Sherlock *v.* Alling (93 U. S., 193); N. Y., New Haven & Hartford R. R. *v.* New York (165 U. S., 631); Cooley *v.* Board of Wardens (12 How., 320).

The identical power of the legislative authority to pass a liability act, abrogating the fellow servant rule, and forbidding the making of contracts of exemption, has been considered in the case of Pierce *v.* Van Dusen (78 F. R., 694), by the Circuit Court of Appeals of the Sixth Circuit, before Associate Justice Harlan and Circuit Judges William H. Taft and Horace H. Lurton. The case was decided in 1897 and the associate justice delivered the opinion for the unanimous court. The direct question in issue was the validity of an Ohio statute, but said the Circuit Court of Appeals—

> Undoubtedly, the whole subject of the liability of interstate railroad companies for the negligence of those in their service may be covered by national legislation enacted by Congress under its power to regulate commerce among the States.

It will be borne in mind that the national legislature had not then regulated as to such negligence, and Mr. Justice Harlan continues:

> But as Congress has not dealt with that subject, it was competent for Ohio to declare that an employee of any railroad corporation doing business there, including those engaged in commerce among the States, shall be deemed, in respect to acts within this State, the superior, not the fellow-servant, of other employees placed under his control.

I may add that a strong analogy to the question under consideration is found in the legislation of Congress, and the decisions of the national courts, requiring safety appliances on all trains engaged in interstate commerce. In Johnson *v.* Southern Pacific Company (196 U. S., 16), the Supreme Court applied and construed the act of March 2, 1893. This required the equipment of locomotives, trains, and cars with air brakes, automatic couplers, etc. Said Chief Justice Fuller (p. 17):

> The primary object of the act was to promote the public welfare by securing the safety of employees and travelers. It is obvious that passengers transported or employees working between intrastate points would enjoy the protection of this exercise by Congress of its power to regulate.

The court thus recognized the right of Congress to legislate for the protection of employees and of the general public, and decided that a dining car in making an interstate journey was equally under the control of Congress while waiting to be made up into a train, as while in motion. While the original safety appliance act made it unlawful for common carriers engaged in interstate commerce to haul cars not properly equipped when "used in moving interstate traffic," the amendatory act of 1903 declared that original provisions should be held to apply to "all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce." Obviously, this was an explicit recognition by Congress of its constitutional right to control the instrumentalities, and prescribe conditions, for all interstate common carriers. This is also the construction given in the recent case of United States *v.* Great Northern Railway Co. (45 F. R., 438), where the court held that the amended act applied to all cars regularly used on any railroad engaged in interstate commerce, not only while actually in use in such commerce, but at all times when in use on such road. The language used by the court is as follows:

> It is manifest that the purpose in view was the regulation of commerce between the States by requiring common carriers to conform to certain requirements regarded as essential to the safety of employees and passengers. To sustain the demurrer would be to hold that it is beyond the power of Congress to control the instrumentalities through which interstate commerce may be carried on. * * * It is the carrier which the acts seek to regulate, and it is by this method that Congress has undertaken to bring the matter under control.

While I am aware that no determination of this great question will be generally satisfactory save that of the Supreme Court, I have not felt at liberty to await the decision of that great tribunal, and thus avoid the responsibility of making my own determination of the pending case. I am clear as to the constitutionality of this measure, but if I were in doubt, I would uphold the law. It is a part of that splendid practical philosophy of government which is intended for the betterment of mankind. The statesmen who dealt with this question did not deal with abstractions. They were not enchanted with those flowers and blossoms which are sometimes woven into garlands to crown that divinity, the sovereign State. Like Lord Bacon, in the Novum Organum and other works written to ameliorate the hardships of life, they were after "fruit." It is pardonable, perhaps, to declare that no court has gone farther than this in the maintenance of those "State rights" which are practical and valuable.

The laws of the State against the sale of intoxicating liquors within three miles of a country church or schoolhouse; to authorize municipal corporations to forbid the sale; forbidding marriage between persons of the negro and white races; the homestead and exemption laws; the laws forbidding the consolidation of competing lines of railway, in violation of the Constitution and in violation of the national law against "combinations in restraint of trade," and other State laws, have been steadily and sincerely upheld. Here, however, no right proper to the State, or any of its instrumentalities of government, is drawn in question. Disquisitions upon profitless, inutile, or imaginary "reserved rights" have never been charming to the writer. Such structures of ratiocination—and I again borrow from Bacon—are "like the ox of Prometheus, a sleek, well-shaped hide, stuffed with rubbish, goodly to look at, but containing nothing to eat."

The law itself deserves the approbation of the entire country. Its incentive to carefulness on the part of those who control railways will be immeasurable. It will bring to many an honest, fearless heart the consciousness that he and his loved ones are insured against the folly and negligence of his fellows, whom he can not control. Had it been of force in the past, thousands of our countrymen who are sleeping in untimely and tragic graves, might now be leading useful lives, and many additional thousands who now spend the interval of life which remains to them in the mortification of mutilation, and in its incurable suffering, might now be happy and well. Surely, at a period when every day brings its story of crashing and murderous collisions, of derailed and shattered trains, the long catalogue of the slain, the mangled and dismembered, such efforts on the part of Government to extend its protecting care around its people, employed in its mightiest interest, should not be lightly discredited. The phi-

lanthropy and statesmanship which prompted it are not undeserving of such a eulogium as that pronounced by Macaulay on the philosophy of Bacon:

> It has lengthened life; it has mitigated pain; it has extinguished diseases; it has increased the fertility of the soil; it has given new securities to the mariner; it has furnished new arms to the warrior; it has spanned great rivers and estuaries with bridges of form unknown to our fathers; it has guided the thunderbolt innocuously from heaven to earth; it has lighted up the night with the splendor of the day; it has extended the range of the human vision; it has multiplied the power of the human muscles; it has accelerated motion; it has annihilated distance; it has facilitated intercourse, correspondence, all friendly offices, all dispatch of business; it has enabled man to descend to the depths of the sea, to soar into the air, to penetrate securely into the noxious recesses of the earth. * * * These are but a part of the fruits, and of its first fruits. For it is a philosophy which never rests, which has never attained, which is never perfect. Its law is progress. The point, which yesterday was invisible, is its goal to-day, and will be its starting post to-morrow.

The demurrer on all grounds is overruled.

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In the United States Circuit Court for the Western District of Washington, Northern Division.

JOHN A. PLUMMER v. NORTHERN PACIFIC RAILWAY COMPANY.

1. The act of Congress of June 11, 1906, relating to the liability of common carriers engaged in commerce between the States to their employees, commonly called the "Federal Employers' Liability Act," is a regulation of interstate commerce, and is within the constitutional power of Congress to regulate commerce.
2. By the Federal Employers' Liability Act the law of the country has been radically changed, but it is harmonious with and not more radical than other laws enacted by Congress in the exercise of the power conferred by the interstate and foreign commerce clause of the Constitution, which have been uniformly acquiesced in by the people and enforced by the national courts since the first shipping law was enacted by the first Congress in the year 1790.
3. The similarity of the Federal Employers' Liability Act to the laws affecting the rights of shipowners and mariners is obvious, and the Constitution contains no suggestion of a more extended grant of power to regulate the business of carriers by water than the power to regulate the business of carriers overland.
4. A retroactive statute enacted by Congress is not unconstitutional unless its effect would be a deprivation of life, liberty, or property, without due process of law; but where a statute like the Federal Employers' Liability Act creates the new right and obligation of comparative negligence, its remedies can not be applied to occurrences antedating the passage of such act without working a deprivation of property.

[Decided March 2, 1907.]

ACTION AT LAW TO RECOVER DAMAGES FOR A PERSONAL INJURY ALLEGED TO HAVE BEEN CAUSED BY NEGLIGENCE OF THE DEFENDANT IN THE OPERATION OF ITS RAILROAD, THE PLAINTIFF BEING AT THE TIME OF THE INJURY IN THE SERVICE OF THE DEFENDANT AS A BRAKEMAN. HEARD ON DEFENDANT'S PETITION FOR A NEW TRIAL, AFTER A VERDICT IN FAVOR OF THE PLAINTIFF FOR $5,000. PETITION GRANTED.

Elias A. Wright and *Herbert E. Snook* for plaintiff.
Carroll B. Graves for defendant.

HANFORD, *District Judge:*

The plaintiff suffered a painful injury while working for the Northern Pacific Railway Company as a brakeman on one of its trains, at

Seattle, in the month of March, 1906. This action was commenced in August, 1906, to recover compensation for said injury, on the alleged ground that it was caused by the negligence of the defendant in failing to keep its track and railway in a condition to be reasonably safe for the employees of the company required to operate its trains. The effects of the injury are permanent, the plaintiff's left leg having been mangled and severed from his body by a car wheel passing over it. By his complaint and the arguments of his counsel upon the trial, the plaintiff claimed damages in the sum of $30,000; the jury awarded him $5,000, which sum is less than probably would have been awarded if it had not been proved that his personal negligence was a contributing cause of the mishap; and a verdict for the defendant on the ground that plaintiff's contributory negligence had been clearly proved by all the evidence introduced, including his own testimony, would have been directed, if the court had not been influenced to refuse to so direct the jury by consideration of the act of Congress of June 11, 1906, commonly called "The Employers' Liability Act," which makes important changes in the law applicable to common carriers engaged in interstate and foreign commerce. The case was submitted to the jury under instructions which assumed that said act is valid and applicable to the case.

A petition to set the verdict aside has been interposed, assigning numerous grounds, the most important of which are that said act is unconstitutional and totally void, and that the court misconstrued the act in ruling that it is applicable to this case. The specifications of the latter ground being that the injury antedated the enactment of the statute referred to and it should not have been held to be retroactive in effect, and the plaintiff did not by his complaint clearly set forth a cause of action based upon said statute, and it was not proved that the particular train upon which the plaintiff was employed, and by which he was injured, was in use at the time as a carrier of merchandise or commodities pertaining to interstate or foreign commerce, and that by the terms of said act the operation of a railway within a State is not subject to its provisions except when carrying on interstate and foreign traffic.

This petition having been presented and argued, the court is now required to review its rulings upon the trial, and the instructions given to the jury. After reflection and deliberation, with due respect to contrary decisions of other courts, I am convinced that the Employers' Liability Act is not unconstitutional, nor, in principle, a departure from the legislative policy of the Government. The substance and sum of the argument against the constitutionality of this statute is, that the whole power of Congress to enact laws affecting the business of common carriers of freight and passengers is con-

ferred by the interstate and foreign commerce clause of the Constitution, and that the contracts of carriers with their employees and the duties and obligations of each to the other are matters of purely local concern and not comprehended within the constitutional grant of power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." This view of the subject appears to me to be much too narrow to accord with the practical and judicial interpretation which has been given to this clause of the Constitution. Commerce has been defined to be traffic—that is, the buying, selling, and exchanging of commodities. This comprehends more than the mere contracts by which merchandise is bought, sold, and exchanged. The actual transfer of merchandise and delivery of the manual possession thereof, and its transportation from one place to another are included. Regulations of commerce are rules to be obeyed in carrying on the business of buying, selling, exchanging, transferring, and moving the property which is the subject of traffic, and to be effective such regulations must not only control the conduct of merchants, bankers, and others engaged as principals in the business, but their servants and agents, and the carriers who serve them in the transportation of property from one place to another, and those who furnish the facilities for communication between distant points which aid the business. Ships, vehicles, railways, telegraph lines, and cables are all necessary to traffic, and subjects of regulations of commerce, which may be prescribed by lawful authority. But merchants and merchandise, bankers and money, clerks, accountants and agents, ships, vehicles, tracks, locomotives, cars, storehouses, wharves, telegraph lines and cables, and the postal service, all combined would be ineffectual to carry on foreign and interstate commerce without the skill and strength of captains, engineers, firemen, seamen, stevedores, trainmen, mechanics, and the host of laborers constituting the force necessary to operate and keep in repair the physical appliances of commerce. The employees who work for wages in every branch of the business, giving life and mobility to trade, are equally subject to regulations of commerce as those whom they serve, and regulations prescribing their rights and obligations with respect to their employment not only affect commerce, but regulate commerce.

By the statute under consideration, the law of the country has been changed radically, but it is harmonious with and not more radical than other laws enacted by Congress in the exercise of the power conferred by the interstate and foreign commerce clause of the Constitution, which have been uniformly acquiesced in by the people and enforced by the national courts, since the first shipping law was enacted by the first Congress in the year 1790. (1 U. S. Stats., p.

131.) The scope of that law is indicated by its title, viz, "An act for the Government and Regulation of Seamen in the Merchants Service." Sixty-five pages of volume 3, U. S. Compiled Statutes, 1901 (pp. 3061–3125), are required to set forth the statutes which have been enacted by Congress relating to seamen in the Merchant Service, prescribing regulations comprising almost every detail of "sailor's rights."

These statutes require contracts for the employment of seamen to be in writing, and signed before the departure of the ships on which they are to serve from the shipping port; they prescribe the minimum daily allowance of food, so that sailors shall not be subjected to hunger, and require warm rooms to be furnished on ships during cold weather, and that medicine chests and slop chests shall be provided for the use and benefit of their crews; they prohibit the flogging and maltreatment of seamen; they subject shipowners and masters to liability for damages for wrongfully withholding wages, and prescribe rules for compelling sailors to perform the obligations of their contracts of employment, and authorize the forfeiture of wages for desertion. These and similar laws are firmly established in the jurisprudence of the country, and they regulate the business of carriers by water, which is an important part of foreign and interstate commerce. It is now too late to make the discovery that the constitutional power of Congress is not ample to authorize legislation on these subjects. The similarity of the statute under consideration to the laws affecting the rights of shipowners and mariners is obvious, and the Constitution contains no suggestion of a more extended grant of power to regulate the business of carriers by water than the power to regulate the business of carriers over land. In the argument in support of the defendant's petition an attempt was made to differentiate maritime commerce from its other branches, by assuming that the admirality jurisdiction of the Federal courts, by a necessary implication, embraces legislative power, and the case of *Butler* v. *Boston Steamship Company* (130 U. S., 527–558) was cited, in which Mr. Justice Bradley said, in effect, that as exclusive jurisdiction of admiralty and maritime cases is vested in the national courts, the exclusive power to legislate on the same subject must be necessarily in the national legislature. Similar dictum may be found in the opinion by Mr. Justice Brown in the case of *The Roanoke* (189 U. S., 185). This, however, falls far short of being a determination by the Supreme Court that the power of Congress to enact shipping and navigation laws, steamboat-inspection laws, and the laws relating to seamen is a mere incident or appendage of the judicial power of the Government, and not within the scope of the powers granted directly to Congress in

express terms. Whilst the three coordinate branches of our Government are intimately connected, and in the performance of their functions interdependent, each is a check on the others, and to insure the independence of each the Constitution, by separate articles, confers the executive power upon the President, the legislative power upon Congress, and the judicial power upon the courts. The regulation of commerce requires the exercise of legislative power, and as the power to regulate is expressly granted in broad terms, there can be no occasion for supplementing it or extending it by implications to comprehend any particular branch of commerce.

It is to be noted that the Employers' Liability Act is not limited to apply only to carriers overland, but applies as well to carriers engaged in maritime commerce.

As a regulation of the business of land carriers this statute is not the first of its kind. The Safety Appliance law, enacted by Congress in 1893, imposes a positive duty on carriers engaged in interstate commerce to protect the lives and limbs of railroad employees and travelers by equipping trains with air brakes and automatic couplers, rendering it unnecessary for a man operating the coupler to go between the ends of the cars, and with secure grab irons or hand holds in the ends and sides of each car for greater security to the men in coupling and uncoupling cars. It also provides for fixing a standard of the height of drawbars for freight cars, and it abolishes the "assumption of risk" rule in all cases in which an employee may be injured by any locomotive, car, or train in use contrary to the provisions of the act.

In the case of *Johnson* v. *Southern Pacific Co.* (196 U. S., 1–22) the Supreme Court of the United States reversed a decision of the Circuit Court of Appeals for the Eighth Circuit, denying to an injured employee the right to recover damages in an action based upon said act, and held that a reasonably liberal rule of interpretation should be applied to the act to give effect to the intention of Congress. In that case the constitutionality of the act does not appear to have been questioned. Nevertheless, the decision of the Supreme Court is necessarily an affirmance of its validity, for it is not presumable that in a contested case, admitted to be of such public importance as to justify the granting of a writ of certiorari to bring it before the Supreme Court for review, learned counsel and the court would have ignored a question of such paramount importance.

As I am constrained to grant the petition for a new trial of this case, for error in the instructions given to the jury to the effect that a verdict in favor of the plaintiff might be rendered, notwithstanding his contributory negligence, an expression of my opinion on the question as to constitutionality of this statute might be evaded now.

But the question has been argued fully by able counsel in this case, and it must be decided in disposing of other cases now pending in this district; therefore I have deemed the first opportunity to be the proper occasion for announcing my positive belief on the subject.

Section 2 of the act provides as follows:

"SEC. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury."

The phrase, "all actions hereafter brought," is broad enough to include actions for injuries suffered prior to the enactment, but although within the letter of the law, such cases must be deemed to be not within its purview if the retroactive effect would defeat the law by making it unconstitutional. I hold that a retroactive statute enacted by Congress is not unconstitutional, unless its effect would be a deprivation of life, liberty, or property, contrary to the fifth amendment, and that the taking away of defenses to civil actions based upon rules of law which are purely arbitrary, e. g., the statute of limitations, would not be such a deprivation. (*Campbell* v. *Holt*, 115 U. S., 620–634.)

The plea of contributory negligence as a defense to an action to recover damages for an alleged tortious injury is an affirmative traverse of the plaintiff's cause of action, similar to a plea of want of consideration as a defense to an action upon an alleged contract, for if it can be established by evidence it disproves the plaintiff's case. Such a defense does not rest upon a mere arbitrary rule exempting a party from legal process to enforce an obligation, but its foundation is in reason and natural justice.

In the case of *Little* v. *Hackett* (116 U. S., 371), Mr. Justice Field, in delivering the opinion of the court, said:

"That one can not recover damages for an injury to the commission of which he has directly contributed is a rule of established law, and a principle of common justice. * * * If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong."

This rule has been heretofore generally recognized as a part of the common law in England and the United States, and the same rule is to be found in the Roman law. (Wharton on the Law of Negligence, 2d ed., sec. 300; 7 Amer. and Eng. Encyc. Law, 2d ed., 371–372.)

Therefore this statute creates a new right and a new obligation. I do not question the justice of the rule of comparative negligence, as it may be applied in actions for injuries suffered after its legalization, but it can not be applied to past occurrences without working a deprivation of property in a manner which the Constitution forbids, for if so applied, the statute, and not the injury, would fix the plaintiff's rights and the defendant's obligation, which are the important elements of the cause of action. For this reason alone the petition for a new trial will be granted.

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Office Supreme Court, U. S.
FILED.
APR 10 1907
JAMES H. McKENNEY,
CLERK.

No. [redacted] 216.

[To accompany brief of the Attorney-General in No. 587, *Damselle Howard v. Illinois Central Railroad Co. et al.*]

Excerpt from the debate in the House of Representatives, April 2, 1906, upon the employers' liability bill, Mr. Sterling being in charge of the bill (40 Cong. Rec., 4711).

Mr. BARTLETT. Will the gentleman permit a question?

Mr. STERLING. I will yield to the gentleman.

Mr. BARTLETT. I would like to inquire of the gentleman as to the construction or intention of this act. Is it to make all railroads that are engaged in interstate commerce liable as provided for in the first section, whether the injury or accident happened while the train or the work that the employee was engaged upon was at the time interstate-commerce business? For instance, take the Southern Railroad, which runs from Macon, Ga., to this city; they also run trains that do not come beyond the limits of the State of Georgia. Suppose upon one of these trains that was doing business in Georgia, and did not go beyond the limits of Georgia, an injury should happen to an employee through the negligence of a coemployee, and the suit should be brought and tried in the State court, would this proposed law make the railroad liable in that instance?

I want to say to the gentleman from Illinois that I am in thorough accord with the purpose of this bill, or any bill that proposes to repeal the common law upon the subject of the negligence of the "fellow-servant," which at present makes it impossible for the servant to recover on account of the negligence of the coemployee, when the injured servant has not himself contributed materially to the injury. Our law in Georgia for fifty years has permitted a railroad employee to recover for the negligence of a fellow-servant, when the injured employee is without fault; but I want to inquire what the gentleman thinks is the effect of this act—whether it relates to an injury inflicted by a railroad engaged in interstate commerce, but the suit is brought for damages inflicted while the railroad is engaged in transactions of business which at the instance [instant] is not interstate commerce?

Mr. STERLING. I will say in reply to the gentleman that, in my opinion, it will affect the railroads engaged in interstate commerce whether the particular train, or the particular employee that is engaged on any particular train, happens to be at the time engaged in carrying commerce from one State to another or not. I will say, further, that the scope of the bill in that regard is set forth substantially in the same words as the act of Congress relating to safety appliances, approved in 1903, and also in substantially the same words as the arbitration law passed by Congress two or

three years ago. I think, and I understand it is the opinion of the Interstate Commerce Commission, that that amendment to the safety-appliance law applies to trains of cars on railroads which carry interstate commerce, regardless of whether the particular car that has not the safety appliance is engaged in interstate commerce or not.

Mr. BARTLETT. I will ask the gentleman one more question, and then I will not trouble him further. Suppose suit is brought for an injury happening under circumstances which the gentleman has last detailed, and suit is brought in the State court, and the State has a law different from the one we have here—for instance, as is the law in the State of Georgia, which does not allow the doctrine of comparative negligence—how will this proposed act affect that?

Mr. STERLING. I think there is no doubt that this statute, within its scope, would control the statutes of the several States. That is one purpose of the bill, to have a uniform rule with reference to the employees engaged in interstate commerce.

Mr. BARTLETT. I have no objection; but what would be the effect—would it abrogate the law of my State?

Mr. STERLING. Yes; if the State law is in conflict with it.

Mr. LACEY. I would like to ask the gentleman a question.

Mr. STERLING. I will yield to the gentleman.

Mr. LACEY. Section 1 of this bill is practically, in its main feature, what we have had in Iowa since 1862, but there is this difference: The Iowa law, first enacted in 1862 and amended in 1873, provides for the negligence of any employee in connection with the operation of the railway when engaged on hazardous business of operating the railway.

Thus it legislates as to a particular class of employees and treats alike all who are engaged in like employment. The question of the constitutionality of the Iowa statute was raised, and it was held valid, because it was limited to the dangers of railroading. It did not apply in railway machine shops and other work of that class. The law has worked well in Iowa for forty-four years, and other States have adopted it. But the constitutional objection was avoided there by the form of the law. I suggest that there may be a question raised under the form of this bill which might easily be avoided. When the subject of the constitutionality of the Iowa law came up it was said that inasmuch as it was limited to that particular hazardous employment and treated all railways alike it was constitutional. Now, railways have machine shops, and this bill, the way it is drawn, provides that in a machine shop "or works" the same rule would not apply to a railroad machine shop that would apply to an ordinary machine shop.

Mr. STERLING. Mr. Speaker, I do not think it would apply to employment in a railroad shop where the company is engaged in the manufacture or repair of cars. I think it would apply to trainmen, switchmen, men in the roundhouse that have charge of the engines, and any other employees whose duty relates to or is connected with the business of carrying commerce, but I do not believe it would go any further than that.

Mr. LACEY. The words "or works" are added. In the Iowa law it is provided that where the injury grows out of the hazardous nature of the railway service and that alone they shall be liable, and that distinction has been drawn and the constitutionality of the law sustained because the distinction was drawn; but if you provide a law that will not protect an employee in an ordinary factory and will protect him in the same sort of a factory when run by a railroad there might be a question about the validity or constitutionality of the act. In the light of the decisions in the Iowa law I suggest that care should be exercised to steer clear of constitutional objections.

Mr. STERLING. Mr. Speaker, I think the reason given by the gentleman himself is sufficient to sustain the bill as constitutional. I think it does relate to the extra hazardous occupation of the men employed by the railroad company.

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No. 216.

Office Supreme Court, U. S.
FILED.
APR 10 1907
JAMES H. McKENNEY,
CLERK.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

UNITED STATES v. WILLIAM ADAIR.

1. The four separate features of the act of Congress of June 1, 1898, commonly called the Erdman Arbitration Act, entitled "An act concerning carriers engaged in interstate commerce and their employees," of arbitration, forfeiture of membership, hearing by the court, and conduct of employing common carrier, have as a real unity and a common purpose an avoidance of an interruption to interstate commerce by resort to strikes, lockouts, or boycotts.
2. Interstate commerce includes interstate intercourse, which is the passage of property, persons, or messages from within one State to within another State. Adjuncts of interstate commerce are the persons, corporate or natural, and their employees effectuating the passage, the means by which they effectuate it, including the ways, artificial or natural, over which, and the instrumentalities by which, the passage is made, and the charges made for the service rendered. Congress has power to regulate such adjuncts of interstate commerce as much as interstate commerce itself.
3. The power of Congress to regulate interstate commerce is the power to enact legislation that directly affects interstate commerce or its adjuncts, and the avoidance of interruption of interstate commerce provided for in the Erdman Arbitration Act directly affects interstate commerce and its adjuncts, and Congress was empowered to enact a law looking to that end by the commerce clause of the Constitution.
4. The implied consent of Congress to State legislation indirectly regulating interstate commerce is temporary only and may be withdrawn at any time; and Congress, whenever it sees fit, may enter the field in that particular by the enactment of similar legislation, which would be exclusive as to interstate commerce.
5. The Erdman Arbitration Act is not without a beneficial effect upon interstate commerce, as its tendency is to prevent an interruption of interstate commerce by reason of strikes, lockouts, and boycotts.
6. Difference of position occupied by a common carrier engaged in interstate commerce and a person engaged in a private business considered and discussed.
7. Section 10 of the Erdman Arbitration Act, which prohibits a common carrier engaged in interstate commerce from discharging an employee or from refusing to employ him because of his membership in a labor organization, is constitutional and valid.

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8. While the commerce clause of the Constitution is limited by the fifth amendment thereof, prohibiting the deprivation of liberty without due process of law, the liberty of a common carrier engaged in interstate commerce to discharge an employee or to refuse to employ him because of his membership in a labor organization is not such a liberty as is protected by the fifth amendment.
9. Such section 10 may be limited in its application to railway employees who are wholly, or partially, adjuncts of interstate commerce, but the fact that said section applies to such employees who are also intrastate employees can not invalidate the section.
10. Such section 10 is not unconstitutional on the ground that it confers privileges upon union labor that are not conferred upon nonunion labor.

W. R. Harr, special assistant to the Attorney-General, and *J. H. Tinsley*, United States attorney, for the United States.

H. L. Stone and *B. D. Warfield* for the defendant.

(Decided April 1, 1907.)

COCHRAN, *Judge:*

This case is before me on demurrer to the indictment. It was found under section 10 of the act of June 1, 1898, ch. 370 (30 Stat., 424), entitled "An act concerning carriers engaged in interstate commerce and their employees."

That section is in these words:

That any employer subject to the provisions of this act, and any officer, agent, or receiver of such employer who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such labor corporation, association, or organization; or who shall require any employee or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employee or applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employee's contribution to such fund; or who shall, after having discharged an employee, attempt or conspire to prevent such employee from obtaining employment, or who shall, after the quitting of an employee, attempt or conspire to prevent such employee from obtaining employment, is hereby declared to be guilty of a misdemeanor, and upon conviction thereof in any court of the United States, of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars, and not more than one thousand dollars.

The ground of the demurrer is that this section of that act is unconstitutional. In order to appreciate the particulars in which it is claimed that it is unconstitutional it is necessary to understand that section and the act of which it is a part.

That act contains twelve sections. The twelfth section repeals a previous act approved October 1, 1888 (25 Stat., 501), entitled—

An act to create boards of arbitration or commission for settling controversies and differences between railroad corporations and other common carriers engaged in interstate and territorial transportation of property or passengers and their employees.

The commission, which, as one of its features it provided for, is composed of three members, two appointed by the President and the other the Commissioner of Labor, was authorized to examine the causes of the controversies and differences referred to in the title, the conditions accompanying them, and the best means for adjusting them, and required to report the result of their examination to the President and Congress. It is stated in one of the briefs filed on behalf of the United States that this act was the result of disturbances growing out of a controversy or controversies between railroad companies engaged in interstate commerce and their employees. I have no means of verifying this statement.

After the great railroad strike at Chicago in June–July, 1894, a commission created under said act examined the causes thereof. It reported the result of its examination to the President November 14, 1894, who transmitted it to Congress December 10, 1894. December 18, 1894, a bill drawn by two of the members of the commission, at the request of the Committee on Labor, and in line with the recommendations of their report, was introduced in the House (H. R. 8259, 53d Cong., 3d sess.). January 17, 1895, another bill covering the same general subject, approved by the Attorney-General, was likewise introduced in the House (H. R. 8556, 53d Cong., 3d sess.) and subsequently passed by it. It failed to pass the Senate. The House in the Fifty-fourth Congress passed a like bill (H. R. 268), which failed to pass the Senate. Similar bills were introduced at the first session of the Fifty-fifth Congress (S. 122, 1014; H. R. 61), and again at the second session thereof (S. 3662; H. R. 4372), and then enacted into said act of June 1, 1898.

That act, therefore, may be said to be an outgrowth of said Chicago strike. In the reports made to the Senate and House it is characterized and treated as a voluntary arbitration bill. As to the need for the bill the Senate Committee on Education and Labor, which reported it to the Senate, said:

The necessity for the bill arises from the calamitous results in the way of ill-considered strikes arising from the tyranny of capital or unjust demands of labor organizations, whereby the business of the country is brought to a standstill and thousands of employees, with their helpless wives and children, are confronted with starvation.

The House Committee on Labor, which reported it to the House, said:

> Persons engaged in interstate commerce, who are most affected by the bill under consideration, have been anxious to secure the enactment into law of such measure as would operate justly and effectively put an end to industrial wars that have resulted from disputes growing out of the questions of wages, hours of labor, and the conditions of employment between the employer and the employee.

The act, however, is something more than a mere voluntary arbitration measure. That may be said to be its principal feature, but it has other features, of which section 10 in question herein is one. By section 1 it is provided "that this act shall apply to any common carrier or carriers and their officers, agents, and employees, except masters of vessels and seamen, as defined in section 4612, Revised Statutes of the United States, engaged in the transportation of passengers or property, wholly by railroad or partly by railroad and partly by water, for a continuous carriage of shipment, from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States."

Sections 2 to 7, inclusive, and section 11 relate to the arbitration feature of the act. The contingency which it is provided is to put it in operation is "whenever a controversy concerning wages, hours of labor, or conditions of employment shall arise between a carrier subject to this act and the employees of such carriers seriously interrupting or threatening to interrupt the business of said carrier," and the arbitration is to be brought about by the endeavor of the Chairman of the Interstate Commerce Commission and the Commissioner of Labor, upon their failure, at the request of either party to the controversy, to amicably settle it by mediation and conciliation, in getting both parties to sign articles of submission to arbitration and choosing two of the three arbitrators. It is provided that in signing the articles of submission and in choosing one of said two arbitrators the employees of the carrier involved in the controversy shall be represented by the labor organization to which they belong, except where the majority of them do not belong to such organization, in which case they shall be represented by a committee chosen by them, and that after an award has been made it shall not be lawful for such organization to order, counsel, or advise any of said employees to quit the service of their employer for three months thereafter without just cause, without giving to said employer thirty days' written notice of an intent so to do.

The other features of the act are contained in sections 8, 9, and 10.

By section 8 it is provided that in every incorporation under the provisions of chapter 567, 25 Stat., 86, entitled "An act to legalize the incorporation of national trade unions," it must be provided in the articles of incorporation and in the constitution, rules, and by-laws that a member should cease to be such by participating in or by instigating force or violence against persons or property during strikes, lockouts, or boycotts, or by seeking to prevent others from working through violence, threats, or intimidations—that members of such incorporations should not be personally liable for the acts, debts, or obligations of the corporation, nor should such corporations be liable for the acts of members or others in violation of law, and that such corporations might appear by designated representatives before the board created by the act, or in any suits or proceedings for or against any such corporations or their members, in any of the Federal courts.

By section 9 it is provided that whenever receivers appointed by Federal courts are in the possession and control of railroads, the employees thereon shall have the right, through the officers and representatives of their associations, whether incorporated or not, to be heard upon all questions affecting the terms and conditions of their employment, and that no reduction of wages shall be made by such receivers without authority of the court therefor upon notice to such employees.

Section 10, under which the indictment herein was found, has heretofore been quoted in full. It makes it a criminal offense, punishable by fine, for any employing common carrier subject to the provisions of the act, and any officer, agent, or receiver thereof, to do either one of four separate things, to wit:

(1) Require any employee or any person seeking employment, as a condition of employment, to enter into an agreement not to become or remain a member of any labor corporation, association, or organization.

(2) Threaten any employee with loss of employment or unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization.

(3) Require any employee or person seeking employment, as a condition of employment, to enter into a contract whereby he shall agree to contribute to any fund for charitable, social, or beneficial purposes, and to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employee's contribution to such fund.

(4) Attempt or conspire after having discharged an employee or after his quitting to prevent him from obtaining employment.

These four separate features of this act—to wit, arbitration, forfeiture of membership, hearing by the court, and employing common carrier's conduct—have more than a mere formal unity—i. e., union in one and the same act. They have a real unity—an organizing idea that makes them parts of a real whole. That idea is a common purpose, and that common purpose in avoidance of an interruption to interstate commerce arising from a resort by employees to strikes, lockouts, or boycotts to redress their real or fancied wrongs.

We are driven to this conclusion by a consideration of the provisions of the act in the light of its history.

The provisions made in the first and third features of the act to avoid such an interruption are a settlement of the controversy between the antagonistic parties in the former by either the mediation and conciliation of the two chairmen or the submission to arbitration and award pursuant thereto, and in the latter by the decision of the Federal court if the railroad is in the hands of its receiver. That made in the last feature is by penalization of certain conduct of the employing common carrier calculated more or less to provoke a controversy between it and its employees which might result in a strike, lockout, or boycott. And that made in the second feature is forfeiture of membership in such trade unions by employees participating in or instigating force, violence, threats, or intimidation during strikes, lockouts, or boycotts. The forfeiture provided for is for participating in or instigating force, violence, threats, or intimidation during strikes, lockouts, or boycotts, and not for participating in or instigating strikes, lockouts, or boycotts. This feature therefore makes no provision for an avoidance of or interruption to interstate commerce by strikes, lockouts, or boycotts, but only for an avoidance of such interruption by force, violence, threats, and intimidation during strikes, lockouts, and boycotts.

Possibly some favoritism toward the employee can be found in the act. It attaches no hurtful consequences to the employee under any consideration for engaging in a strike, lockout, or boycott. Possibly the power to attach such consequences was quite limited. There would seem, however, to be no reason why forfeiture of membership could not have been based on a participation in or instigation of a strike, lockout, or boycott as well as on a participation in or instigation of force, violence, threats, or intimidation during a strike.

Possibly, also, this forfeiture of membership feature and the penalizing of certain of the conduct of the employing common carriers would have but little effect in preventing a strike, lockout, or boycott. Yet it can not be said that they would not have some effect.

This idea, therefore, of avoiding an interruption to interstate commerce pervades the whole act and pervades section 10.

The indictment contains two counts. In each it is alleged that at the time of the commission of the offense charged the defendant, William Adair, was master mechanic of the Louisville and Nashville Railroad Company, a common carrier engaged in interstate commerce, and one O. B. Coppage, a member of the Order of Locomotive Firemen, a labor organization, was in its employ as a locomotive fireman. The offense charged in the first count is that the defendant unjustly discriminated against said Coppage because of his membership in said order by discharging him from said employment on that ground. That charged in the second count is that the defendant threatened said Coppage with loss of employment because of his membership in said order.

It is claimed that said section is unconstitutional for several reasons. The first one is that no warrant for its enactment is to be found in the Federal Constitution. It is denied that it is within subsection 3, section 8, Article I, conferring on Congress power "to regulate commerce with foreign nations and among the several States and with the Indian tribes," the only provision thereof which it can be claimed justifies it. Is this denial sound?

The question whether any given legislation by Congress is within this provision hangs upon two others. What is it that Congress is thereby empowered to regulate, and what is to regulate it? It is empowered to regulate nothing else and to do nothing else to it than to regulate it.

In considering what it is Congress is thereby empowered to regulate, I will, for convenience sake, limit myself to commerce among the several States, or interstate commerce.

Interstate commerce, though perhaps not limited thereto, includes interstate intercourse. We are concerned here with no more. Interstate intercourse is the passage of property, persons, or messages from within one State to within another State. It has certain adjuncts, to wit, the persons, corporate or natural, and their employees effectuating the passage, the means by which they effectuate it including the ways, artificial or natural, over which, and the instrumentalities by which the passage is made, and the charges made for the service rendered. Strictly speaking, these things are not interstate intercourse or commerce. They are merely the adjuncts thereof. Congress, however, is empowered by said provision to regulate the adjuncts of interstate commerce as much so as interstate commerce itself. Its power to regulate them is as extensive, full, and complete as its power to regulate it. The rationale or judicial explanation of this may be debatable. It may be because within the meaning of said provision the adjuncts of such commerce are parts thereof, or because to regulate the adjuncts thereof is to regulate it, or because power to

regulate the former is granted by necessary implication—to regulate the latter being all that is expressly granted. Or it may be that the power to regulate the adjuncts of interstate commerce is dependent somewhat on the last subsection of said section 8, article 1, which confers on Congress power to pass laws necessary and proper to carry into execution the powers conferred by the other and preceding sections thereof. But as to the existence of power to regulate the adjuncts of interstate commerce, and as to the extent thereof being as stated, there can be no question.

What I have said as to the nature of interstate commerce and its adjuncts is not put forward as exhaustive or exactly accurate. The matter has not been sufficiently reflected upon for me to be absolutely sure of my ground. It is put forward simply as a working basis and is deemed sufficient for that purpose. It is a deduction from the relevant decisions of the Supreme Court of the United States. I will not, however, pause to make this good.

What is it, then, to regulate interstate commerce and its adjuncts? This question requires a more extended consideration, as it is here that it is claimed, on behalf of defendant, that said section breaks down. It is urged that the power to regulate, conferred by said provision of the Federal Constitution, is a power to regulate directly and substantially, and not indirectly, remotely, incidentally, or collaterally, and that said section, in so far as it is a regulation at all, is an indirect and not a direct one, and hence not within such power. Two lines of decisions of the Supreme Court of the United States are relied on in support of both these positions, i. e., as to the nature of said power and as to the nature of the legislation embodied in said section.

One line consists of decisions in cases in which the application of the antitrust act of July 2, 1890, was involved, and divides itself into two classes—those where it was held that it did not apply and those where it was held that it did. Cases of the former class are the following, to wit: United States *v.* E. C. Knight Co. (156 U. S., 1); Hopkins *v.* United States (171 U. S., 578); Anderson *v.* United States (171 U. S., 604).

Cases of the latter class are the following, to wit: United States *v.* Trans-Missouri Freight Association (166 U. S., 279); United States *v.* Joint Traffic Association (171 U. S., 505); Addyston Pipe and Steel Co. *v.* United States (175 U. S., 211); Northern Securities Co. *v.* United States (193 U. S., 197); Swift & Co. *v.* United States (196 U. S., 375).

The other line consists of decisions to the effect that certain State legislation was not an encroachment on the commercial power of Congress and hence was valid. Amongst the cases cited containing such decisions are the following, to wit: Sherlock *v.* Alling (95 U.

S., 102); Escanaba Co. *v.* Chicago (107 U. S., 678); Smith *v.* Alabama (124 U. S., 465); Kidd *v.* Pearson (128 U. S., 1); Nashville, etc., Rwy. Co. *v.* Alabama (128 U. S., 96); Hennington *v.* Georgia (163 U. S., 299); C., M. & St. P. Rwy. Co. *v.* Solan (169 U. S., 133); Williams *v.* Fears (179 U. S., 270).

I can not accede to the correctness of either position, i. e., as to the nature of said power or as to the nature of said legislation, or that either finds support in either one of these lines of decision.

The position as to the nature of the power conferred on Congress by said constitutional provision interpolates therein the qualifying word "directly." The power conferred thereby is "to regulate" without limitation, and not "to regulate directly." The courts have no right to limit a constitutional provision by inserting a qualifying word therein. They must take it as they find it. If, then, there is such a thing as an indirect regulation of interstate commerce, or its adjuncts—if indeed all regulation is not in its very nature direct—it is hard to conceive why it is not covered by the power conferred. In the case of Gibbons *v.* Ogden (9 Wheat., 1), Mr. Chief Justice Marshall said:

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

The correct definition of the power, as it seems to me, is that it is the power to enact legislation that *directly affects* interstate commerce or its adjuncts, and not legislation that *affects* it or them *indirectly* only. Or it may be put this way: It is the power to enact legislation which relates to, acts upon, or touches interstate commerce or its adjuncts or legislation, of which either is the subject. Such legislation affects them directly. Legislation which does not relate to, act upon, or touch them, or of which they are not the subject can only affect them indirectly.

No support of the position of defendant's counsel as to the nature of the power in question can be found in either of the two lines of decisions relied on by them. So far as they throw light on the subject they bear out the statement as to the nature thereof, which I have put forward. The last line throws less light on it than the first. This is to be expected, as it has to do with State legislation; whereas the other has to do with Congressional legislation. Indeed, the decisions in the Sherlock, Escanaba Company, Smith, Nashville, etc., Railway Company, Hennington, and Solan cases, and certain expressions in the opinion in some of them, may mislead one as to the nature of that power or the subject of it, if he is not careful. The legislation involved in those cases and held valid was as follows, to wit:

In the Sherlock case, the Indiana wrongful death statute in its applicability to owners of steamboats engaged in interstate com-

merce; in the Escanaba Company case, the Chicago bridge ordinance providing that the draws in the bridge across Chicago River should be closed at certain times in the day and not kept open longer than ten minutes at other times; in the Smith case, the Alabama statute requiring locomotive engineers to be examined and licensed in its applicability to such engineers engaged in interstate commerce; in the Nashville, etc., Railway Company case, the Alabama statute prohibiting employment in certain capacities by railroad companies of persons afflicted with color blindness, in its applicability to such companies when engaged in interstate commerce; in the Hennington case, the Georgia statute prohibiting the operation of railway trains on Sunday in its applicability to such as were so engaged, and in the Solan case, the Iowa statute prohibiting contracts by railroad companies to exempt them from liability as a common carrier in its applicability to such companies when so engaged.

These decisions may mislead one as to the nature of said power or the subject of it, that if he does not duly consider them he may think that it follows from the fact that it has been held thereby that a State legislature has power to enact such legislation, that Congress has no power to enact similar legislation. He will naturally so think if he has the idea that in no state of case can a State legislature enter the field of interstate commerce or its adjuncts—that so far as that field can be occupied at all by legislation it can only be occupied by Congressional legislation, and, properly so, if such idea is correct. For if in no state of case can a State legislature enter such field, a decision that particular legislation enacted by it is valid, necessarily means that it does not by its enactment enter it, and if by its enactment it does not enter that field, Congress by the enactment of similar legislation would not enter it either, and hence its action would be beyond its power. But that idea is not correct. It is not true that in no state of case can a State legislature enter the field of interstate commerce or its adjuncts.

The commercial provision of the Federal Constitution does not in terms exclude the several States from the field of interstate commerce and its adjuncts. It simply confers on Congress power to enter it; if they are excluded therefrom it can only be as an inference from the grant of power to Congress to enter it. It is held that this is a proper inference therefrom, and that the power of Congress to enter that field is exclusive. But it does not follow from this that a State legislature can in no state of case enter it. It simply follows therefrom that a State legislature can not enter it without the consent of Congress. In the matter of consent, it is not necessary that it be expressly or affirmatively given. It may be given by mere silence, or, as it is frequently put, by non or inaction. One of the most difficult problems that the Supreme Court of the United States in its history has

had to deal with has been the question as to when such consent is to be implied and when it is not. It has often been referred to in the opinions of that court as difficult and perplexing, and has frequently caused dissent amongst the justices thereof. The court has always refused to lay down any single and exact rule or decision applicable to all cases that might arise. It lies outside of my path to make any reference to the considerations that have been referred to as having a bearing on the solution of the problem. The outcome of the presentation of the problem to that court has been two lines of decisions. One consists of cases where it has been held that such consent is not to be implied. It begins with the case of Gibbons *v.* Ogden (9 Wheat., 1). The other consists of cases where it is held that it is to be implied. It begins with the case of Wilson *v.* Black Bird Creek March Co. (2 Pet., 245).

It is to this latter line of decisions that the Sherlock and other cases just considered belong. It embraces many others. That the implied consent of Congress to the enactment of such legislation by a State legislature is the determining factor in the matter of its validity, is not brought out in the earlier cases. It is only later that it appears that such is the case.

Such consent, when it is implied, is temporary only. It may be withdrawn at any time. Congress, whenever it sees fit to do so, may enter the field in that particular by the enactment of similar legislation. If it does so it thereby ousts the State legislation. This is recognized in each of the cases referred to above.

In the Sherlock case Mr. Justice Field said:

> Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representative of the deceased and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress.

In the Escanaba Company case Mr. Justice Field said:

> But until Congress acts on the subject the power of the State over bridges across its navigable streams is plenary.

And again:

> It is therefore, a matter of good sense and practical wisdom to leave their control and management with the States; Congress having power at all times to interfere and supersede their authority whenever they act arbitrarily and to the injury of commerce.

In the Smith case Mr. Justice Matthews said:

> The statute of Alabama, the validity of which is drawn in question in this case, does not fall within this exception. It would indeed be competent for Congress to legislate upon its subject-matter, and to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or

interstate commerce. It has legislated upon a similar subject by prescribing the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States while engaged in commerce among the States; and such legislation is undoubtedly justified on the ground that it is incident to the power to regulate interstate commerce.

In the Nashville, etc., Railway Company case, Mr. Justice Field said:

It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in that commerce; and that such legislation will supersede any State action on the subject. But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits.

In the Hennington case, Mr. Justice Harlan said:

The argument on behalf of the defendants rests upon the erroneous assumption that the statute of Georgia is such a regulation of interstate commerce as is forbidden by the Constitution, without reference to affirmative action by Congress, and not merely a statute enacted by the State under its police power, and which, although in some degree affecting interstate commerce, does not go beyond the necessities of the case, and therefore is valid, at least until Congress interferes.

And again:

The legislative enactments of the States passed under thier admitted police powers and having a real relation to the domestic peace, order, health, and safety of their people, but which by their necessary operation affect to some extent or for a limited time the conduct of commerce among the States, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce, and, if not obnoxious to some other constitutional provision or destruction of some right secured by the fundamental law, as to be respected by the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution.

In the Solan case Mr. Justice Gray said:

The rules prescribed for the construction of railroads and for their management and operation designed to protect persons and property otherwise endangered by their use are strictly within the scope of the local law. They are not in themselves regulations in interstate commerce, although they control in some degree the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are to be regarded as legislation in aid of such commerce and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits.

The case of New York, New Haven and Hartford Railroad Co. *v.* New York (165 U. S., 628), belonging to the same line of decisions as the foregoing, but not cited by defendant's counsel, in which the New York statute forbidding the heating of passenger cars in that State by stoves or furnaces kept inside the cars or suspended there-

from was held valid in its applicability to cars engaged in interstate commerce, Mr. Justice Harlan said:

> Nor is it within the meaning of the Constitution a regulation commerce, although it controls in some degree the conduct of those engaged in such commerce. So far as it may affect interstate commerce, it is to be regarded as legislation in aid of commerce and enacted under the power remaining with the State to regulate the relative rights and duties of all persons and corporations within its limits. Until displaced by such national legislation as Congress might rightfully establish under its power to regulate commerce with foreign nations and among the several States the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, can not be questioned.

As to the theory on which a State has power to tax the property of an interstate-commerce adjunct of interstate commerce, I have not considered the matter sufficiently to express an opinion, and it is not necessary here that I do so.

It does not follow, then, from the decisions in those cases that Congress has no power to enact similar legislation to that involved therein. On the contrary, it follows therefrom—the validity thereof depending on the implied consent of Congress—that it has power to enact similar legislation. And this is expressly recognized in the quotations I have made from the opinions embodying those decisions. Viewed in this light these decisions instead of misleading one as to the nature of said power or its subject will be helpful in enabling one to arrive at a true notion in regard thereto.

Then as to the expressions in some of said opinions which may mislead one. I have in mind such expression as that in the quotation made from the opinion of Mr. Justice Gray in the Solan case, contained in these words, to wit: "They are not in themselves regulations of interstate commerce." And as that in the quotation from the opinion of Mr. Justice Harlan in the New York, New Haven and Hartford Railroad Company case contained in these words, to wit: "Nor is it, within the meaning of the Constitution, a regulation of commerce, although it controls in some degree the conduct of those engaged in such commerce." Substantially similar expressions may be found in the opinion of Mr. Justice Matthews in the Smith case in these words, to wit: "But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such." And again: "They are not per se regulations of such commerce; it is only when they operate as such in the circumstances of their application and conflict with the expressed or presumed will of Congress enacted on the subject that they can be required to give way to the supreme authority of the Constitution." And in the opinion of Mr. Justice Harlan in the Hennington case, where he speaks of such local laws not being "within the meaning of the Constitution and considered

in their own nature regulations of interstate commerce, simply because for a limited time, or to a limited extent, they cover the field occupied by those engaged in such commerce."

Such expressions can not be construed to mean that such legislation, if enacted by Congress, as to interstate commerce or its adjuncts, would not be regulations thereof. Congress would not have power to enact them unless they were. The fact that Congress has power to so enact them, according to the conclusion heretofore reached, settles the fact that they would be such regulations if so enacted.

We are now in position to appreciate the value of the decisions which we have been considering in extenso in their bearing on the nature of the commercial power of Congress. The legislation involved therein if enacted by Congress as to interstate commerce and its adjuncts, would affect them directly. It would relate thereto, act upon, and touch it, and such would be the subject thereof. And it follows that the nature of that power is to enact legislation that will do and be this.

The other two decisions belonging to said second line cited and relied on by defendant's counsel, tend in the same direction. They are the decisions in the Kidd and Williams cases. There the State legislation involved was held valid not because of any implied consent by Congress to its enactment, but because the enactment of such legislation was not an entry within the field of interstate commerce or its adjuncts.

In the Kidd case the legislation involved was the Iowa statute prohibiting the manufacture and sale of intoxicating liquors in that State; and in the Williams case the legislation involved was the Georgia statute imposing a tax on emigrant agents—that is, persons hiring others in that State to labor in other States. In neither case did the statute affect interstate commerce or its adjuncts directly, or relate thereto or act upon or touch either, nor was such the subject thereof. So far as they affected either they affected it indirectly. The subject-matter of each was something other than interstate commerce or its adjuncts.

We come then to the first line of decisions cited and relied on by defendant's counsel as bearing out their claim as to the nature of the commercial power of Congress and which, I think, bear out the statement which I have put forward as to the nature thereof. As they have to do with Congressional legislation, it is to be expected that they will settle beyond question the true nature of that power, and in this we will not be disappointed.

The exact question in each of those cases was not whether Congress might enact any particular legislation under its commercial power, but whether the contract involved therein was in restraint of

interstate commerce within the meaning of said antitrust act, and prohibited by it. That act, however, depended for its validity on said power of Congress, and its meaning—the kind of contracts intended to be covered thereby—was treated in those cases as dependent on the nature of that power. It was held that it covered contracts that affected interstate commerce directly—that related thereto, acted upon, and touched it, and of which it was the subject, and did not cover contracts that affect it indirectly only and which did not relate thereto, act upon, or touch it, or of which it was not the subject.

In the Knight case the contract involved affected directly the manufacture of sugar in the State of Pennsylvania; it related to, acted upon, and touched it, and such manufacture was the subject thereof. It affected interstate commerce indirectly only. It did not relate thereto, act upon, or touch it, and such commerce was not the subject of it. It was held not within the act. In the Hopkins and Anderson cases the contracts involved were between the members of certain live-stock exchanges doing business in Kansas City, Mo., embodied in certain rules thereof. Those contracts affected directly the buying and selling of live stock at the stock yards in said city. They did not relate to interstate commerce on live stock and affected it indirectly only. They were held to be not within the act. In the Trans-Missouri Freight Association, Joint Traffic Association, and Northern Securities Company cases the contracts involved were between common carriers engaged in interstate commerce. In the Addyston Pipe and Steel Company case the contract involved was between persons engaged in interstate commerce in iron pipe. And in the Swift and Company case the contract involved was between persons engaged in interstate commerce in meat. The contract in each instance affected directly the interstate commerce carried on by the parties thereto. It related to such commerce, acted upon, and touched it, and such commerce was the subject thereof. It was held in each instance that the contract was within the act.

It follows from these holdings that the nature of the commercial power of Congress is as I have stated it. Legislation prohibiting contracts that affect interstate commerce or its adjuncts indirectly or which do not relate thereto, act upon or touch either, or of which such is not the subject, itself affects interstate commerce or its adjuncts indirectly and does not relate thereto, act upon or touch them, and such is not the subject thereof. It is only legislation prohibiting contracts that affect interstate commerce or its adjuncts directly, or that relate thereto, act upon or touch either, or of which such is the subject that itself affects interstate commerce or its adjuncts directly and relates thereto, acts upon and touches them, and of which such is the subject.

In the course of his opinion in the Addyston Pipe and Steel Company case Mr. Justice Peckham frequently refers to contracts within said act as those *regulating* said commerce *directly* and substantially and not those *regulating* it *indirectly*, remotely, incidentally, and collaterally. It is this reference no doubt that suggested the position taken here as to the nature of said power which I have criticised. There are, however, other references in said opinion which show that what he had in mind was the distinction between contracts and legislation that *affected* interstate commerce *directly* and contracts and legislation that *affected* it *indirectly*, which is the correct way, as I submit, of putting the matter.

I have thus arrived at the conclusion as to the nature of the power in question by a generalization of the two lines of decisions cited and relied on by defendant's counsel as upholding their view thereof. The generalization might have taken a wider scope by embracing the great number of other decisions involving the validity of State legislation claimed to be an encroachment on the commercial power of Congress not cited or relied on. But to have done so would not have changed the result, but would have unduly lengthened this opinion.

There are not many other decisions of the Supreme Court involving the validity of Congressional legislation, whose validity was dependent on that power, that can be considered in arriving at such a conclusion. Until lately legislation in any way affecting interstate commerce or its adjuncts has been enacted principally by State legislatures. There has not been a great amount of Congressional legislation affecting that matter. It is only in recent times that it has become, to any great extent, the subject of Congressional consideration and action. It is just what one would expect, therefore, to find that there are not many decisions of that court dealing with the validity of such legislation. Outside of those already considered, I do not deem it important to make any reference to any such decisions beyond the case of Johnson *v.* Southern Pacific (196 U. S., 1). It involved the safety-appliance act of Congress of March 2, 1893 (27 Stat., 531, C. 196). The constitutionality of the act was assumed therein. It was not attacked. The decision was occupied entirely with its construction. The safety-appliance act affected directly an adjunct of interstate commerce, to wit, the cars engaged therein, and that as to their couplers. It related thereto, acted upon, and touched it, and such was the subject thereof.

I am aware that the classic definition of the power in question is to be found in the words of Mr. Chief Justice Marshall, in the case of Gibbons *v.* Ogden, when he said that the power to regulate commerce is the power "to prescribe the rule by which commerce is to be gov-

erned," often subsequently repeated in subsequent decisions of the Supreme Court in substantially the same words. Mr. Justice Harlan, in the case of Champion *v.* Ames (188 U. S., 321), characterized it as a "general observation."

What I have advanced is simply the outcome of a struggle after something more definite. After the great number of decisions of that court involving State and Congressional litigation affecting interstate commerce and its adjuncts, the matter ought to be capable of more definite statement. A true generalization thereof is bound to give it.

Having thus reached a conclusion as to the nature of the power in question, we come to the other position of defendant's counsel, to wit, that said section is not within said power. And in disposing of it I will treat its nature as I have defined it, and not as they have. Does it affect interstate commerce, or any of its adjuncts, directly? Does it relate thereto, act upon, or touch either, or is either the subject of it? It must be admitted that it does and that such is the case. It affects an adjunct of interstate commerce, relates thereto, acts upon, and touches it, and such is the subject of it. That adjunct is common carriers engaged in interstate commerce, and their officers, agents, and employees. It forbids them from doing any of the things covered by that section.

But it may be thought that it is not sufficient that Congressional legislation should affect an adjunct of interstate commerce directly, relate thereto, act upon, or touch it, or that it be the subject thereof in order to be valid. To this end it must serve some useful purpose in regard to interstate commerce itself, and not be intended to, and in fact, accomplish no more than some ulterior purpose. I am not prepared to say that such a view is not correct. There is nothing in the Johnson case impugning its correctness. Of course the requirement as to providing couplers was and is beneficial to the manufacturers thereof and to brakemen; but it is beneficial also to interstate commerce itself. It made it more attractive for brakemen to engage therein by lessening the danger of the business. The necessities of this case do not require that I should dispute the correctness of this view.

The section involved herein is not without a beneficial effect upon interstate commerce itself. Its tendency is to prevent an interruption to interstate commerce by reason of strikes, lockouts, and boycotts, and such, as I have already stated, was its intent.

Until recent times the national attitude toward interstate commerce has been almost solely to prevent its being burdened and interrupted. Such has been the controlling consideration in determining the validity of State legislation affecting it or its adjuncts.

In the case of The United States *v.* Coombs (12 Pet., 72) the question involved was whether one could be indicted under the act of Congress entitled "An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," approved March 3, 1825, for stealing a quantity of merchandise belonging to a ship wrecked on the coast of New York, the goods at the time they were stolen being above high-water mark, and hence outside of the jurisdiction of the United States. It was held that he could. Mr. Justice Story said:

> It (commercial power of Congress) does not stop at the mere boundary line of a State, nor is it confined to acts done on the water or in the necessary course of the navigation thereof. It extends to such acts done on land which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations and among the States. Any offense which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by Congress under its general authority to make all laws necessary and proper to execute their delegated constitutional powers. No one can doubt that the various offenses enumerated in the tenth section of the act are all of a nature which tend essentially to obstruct, prevent, or destroy the due operation of commerce and navigation with foreign nations and among the several States.

In the case of In re Debs (158 U. S., 565) it was held that the United States, through its Attorney-General, had a right to bring a suit to enjoin the interruption of interstate commerce caused by the Chicago strike of 1894.

The antitrust act of 1890 is another manifestation of this national attitude, and there would seem to be no room to doubt that the tenth section of the act of June 1, 1898, involved herein, is a still further manifestation thereof.

The ground upon which it is claimed by defendant's counsel that said section does not affect directly or, as they have it, regulate directly that which is the subject of the commercial power of Congress, and hence is not within it, is that "it is merely an intermeddling by Congress with the private relations between master and servant." But it does not deal with the relations between master and servant in the abstract. It deals with the relations between particular masters and servants, to wit, common carriers engaged in interstate commerce and their employees. Such carriers and their employees are the adjuncts of such commerce. Hence said legislation affects those adjuncts directly. It relates thereto, acts upon, and touches them, and they are the subjects thereof. This being so, it is within that power.

I conclude, therefore, that said section is not unconstitutional for this reason.

Another reason given in support of the claim that said section is unconstitutional is that however it may be as to its being within the

commercial power of Congress it is prohibited by the fifth amendment to the Federal Constitution, in so far as it provides that no person shall "be deprived of life, liberty, or property without due process of law." In other words, it is claimed that that portion of said amendment is a limitation upon the commercial power of Congress, and though said section comes within the latter it comes within the former also. It must be conceded that if this position is correct, then said section is unconstitutional.

Defendant's counsel cite in support of this position the following decisions of the highest courts of the States of Missouri, Illinois, Wisconsin, and New York, to wit: State *v.* Julow (129 Mo., 163), Gillespie *v.* People (188 Ill., 176), State *v.* Kreutsburg (58 L. R. A., 748), People *v.* Marcus (77 N. E., 1073).

In each of these cases a State statute was involved substantially similar to said tenth section, in making it an offense for an employer to discharge or refuse to employ an employee because of his membership in a labor organization. In those cases they were sought to be enforced against persons engaged in private business—in the Missouri and New York cases against a manufacturer and in the Illinois case against a contractor. It does not appear in what business the defendant was engaged in in the Wisconsin case. In each case the statute was held to be unconstitutional as in violation of certain provisions of the State constitution and of the fourteenth amendment to the Federal Constitution, in so far as it prohibited State action depriving any person of life, liberty, or property without due process of law.

Counsel for the United States contend that said decisions are erroneous. They maintain that such statutes do not deprive the employer of any lawful right; that they simply protect the rights of employees against invasion by the employer, and that the alleged right of the employer is a right to interfere with the liberty of his employees because they are in his service. This argument merely begs the question. No decision is cited to the contrary of those decisions, except a nisi prius decision in the case of Davis *v.* State (30 Ohio Law Jr., 342).

I am not disposed to question the correctness of those decisions. On the contrary, they seem to me based upon sound reasoning. As said by Cooley on Torts, 278:

> It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern.

But it does not follow from the correctness of these decisions that section 10 is unconstitutional, though it seems quite plausible that if State legislation of this character is unconstitutional as being in viola-

tion of the fourteenth amendment, prohibiting State action depriving any person of life, liberty, or property without due process of law, said tenth section is unconstitutional also as being in violation of the fifth amendment prohibiting Federal action depriving a person of life, liberty, or property without due process of law. The question may be thought to depend upon whether said fifth amendment is a limitation upon the commercial power of Congress conferred by subsection 8, section 3, Article I, of the original Constitution.

In the case of Gibbons *v.* Ogden, Mr. Chief Justice Marshall, in the language heretofore quoted, said:

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

This language is repeated several times in subsequent cases. It would seem to imply that limitations on said power are to be found in the Federal Constitution. I have found nowhere any statement as to what limitations thereon are to be found therein. Nor have I taken the time to study the Constitution with a view of ascertaining for myself those limitations; but it would seem to be reasonable to hold that said amendment is a limitation on said power.

In the case of United States *v.* E. C. Knight Co. (156 U. S., 1), Mr. Justice Harlan, in his dissenting opinion, said:

> In committing to Congress the control of commerce with foreign nations and among the several States, the Constitution did not define the means that may be employed to protect the freedom of commercial intercourse and traffic established for the benefit of the people of the Union. It wisely forbore to impose any limitations upon the exercise of that power except those arising from the general nature of the Government, or such as are embodied in the fundamental guarantees of liberty and property.

It would hardly be held that it was not a limitation on the commercial power of Congress in the matter of depriving a person of his property without due process of law.

In the case of Monongahela Nav. Co. *v.* United States (148 U. S., 334), Mr. Justice Brewer said:

> But like the other power granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the fifth amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this fifth amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post-offices and post-roads; but if Congress wishes to take private property upon which to build a post-office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor.

If Congress were to pass a law reducing the rates for interstate transportation of passengers or goods to such a point as to amount to

a confiscation of the property of a common carrier engaged therein, there can be no question that such a law would be held to be affected by the fifth amendment. If, then, said amendment limits said power in the matter of depriving a person of his property without due process of law, no reason can be given why it should not be held to limit said power in the matter of depriving a person of his liberty without due process of law.

Yet it has been held in the cases heretofore considered in which the antitrust act of 1890 has been applied, that it does not limit said power of Congress in prohibiting contracts in reasonable restraint of interstate commerce, whether made by common carriers or others engaged therein. The liberty of private contract in this particular is held not to be preserved by said amendment as against the commercial power of Congress.

In the Addyston Pipe & Steel Company case, Mr. Justice Peckham said:

> The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature, while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution.

But conceding, as I think we must do, that said amendment is a limitation to a certain extent at least upon the commercial power of Congress, in so far as it prohibits a deprivation of liberty without due process of law, is the legislation in question a deprivation of such liberty within the meaning thereof, and hence unconstitutional? This depends entirely upon what liberty is intended to be protected thereby. It is certainly not the liberty to do what one pleases that is thereby protected from invasion by Congress under its commercial power. We have just seen that the liberty of making reasonable contracts in restraint of interstate commerce are not so protected. Congress under its commercial power, notwithstanding said amendment, had the right to enact the antitrust act of 1890, which has been construed to prohibit the making of such contracts, or of any contracts that directly affect by way of restraint such commerce.

In the case of Champion *v.* Ames (188 U. S., 355) it was held that the act of Congress prohibiting the transportation of lottery tickets from one State to another by an express company was valid under said commercial power, notwithstanding said amendment. Mr. Justice Harlan there said:

> But surely it will not be said to be a part of any one's liberty as recognized by the supreme law of the land that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals.

In view of these decisions one must conclude that it is only a liberty that it is reasonable and proper that should not be subject to invasion by Congress under its commercial power that is protected therefrom by said amendment. The matter here then comes to this: Is the liberty of a common carrier, engaged in interstate commerce, to discharge an employee or to refuse to employ him because of his membership in a labor organization such a liberty as that it is reasonable and proper that it should not be interfered with by Congress under its commercial power? We have seen that it has been held that the liberty of one engaged in what may be characterized as a lawful private business to so act is such that it is reasonable and proper that it should not be invaded by State legislation, and that it is protected by the fourteenth amendment. But it does not follow from this that the liberty of such a common carrier to so act is such that it is not reasonable or proper that it should be invaded by Congress under its commercial power. A person engaged in a lawful private business and a common carrier engaged in interstate commerce occupy entirely different positions. The former has a fundamental right upon his own choice to engage in and carry on such business. The latter has no such right. It exercises a public function and has no right to exercise it except by consent of the National Government, express or implied.

The position that a common carrier, such as a railroad, for instance, exercises a public function is upheld by frequent statements in the opinions of the Supreme Court.

In the case of Charlotte C. & A. R. Co. *v.* Gibbs (142 U. S., 386) Mr. Justice Field said:

> Though railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public. They are formed for the convenience of the public in the transportation of persons and merchandise and are invested for that purpose with special privileges. They are allowed to exercise the State's right of eminent domain that they may appropriate for their uses the necessary property of others upon paying just compensation therefor—a right which can only be exercised for public purpose. And they assume, by the acceptance of their charters, the obligations to transport all persons and merchandise upon like conditions and at reasonable rates, and they are authorized to charge reasonable compensation for the services they thus perform.

Mr. Justice Brewer, in his dissenting opinion in the case of Budd *v.* New York (143 U. S., 517), said:

> Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity, to wit, the State, has a right to create and maintain, and therefore one which all the public have a right to demand and share in. The use is public, because the public may create it, and the individual creating it is doing thereby and pro tanto the work of the State. The creation of all highways is a public duty. Railroads are highways. The State may build them. If an individual does that work he is pro tanto doing the work of the State. He devotes his property to a public use.

In the case of L. & N. R. Co. *v.* Kentucky (161 U. S., 693) Mr. Justice Brown said:

It has been too often held that railways were public highways and their functions were those of the State, though their ownership was private, and that they were subject to control for the common good, to be now open to question.

And in the case of United States and Joint Traffic Association (171 U. S., 567) Mr. Justice Peckham said:

When the matter of the building of railroads as highways arose, a question was presented whether the State should itself build them or permit others to do it.

And again:

The business of a railroad carrier is of a public nature, and in performing it the carrier is also performing to a certain extent a function of government which, as counsel observed, requires them to perform the service upon equal terms of all.

It follows, then, that a common carrier engaged in interstate commerce is exercising a function of the National Government and that by its consent, express or implied. The National Government can itself exercise that function.

In the case of California *v.* Central Pac. R. Co (127 U. S., 1) Mr. Justice Bradley said:

The power to construct or to authorize individuals or corporations to construct national highways and bridges from State to State is essential to the complete control and regulation of interstate commerce. Without authority of Congress to establish and maintain such highways and bridges it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the Territories of the United States and its power to grant franchises exercisable therein are and ever have been undoubted. But the wide power was very freely exercised and much to the general satisfaction in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of States as well as Federal corporations.

And in the case of Wilson *v.* Shaw, decided January 7, 1907, the Supreme Court based the right of the United States to build the Panama Canal, which was questioned therein, on its commercial power. Mr. Justice Brewer said:

Again, plaintiff contends that the Government has no power to engage anywhere in the work of constructing a railroad or canal. The *decisions* of this court are adverse to this contention. * * * These authorities recognize the power of Congress to construct interstate highways. A fortiori Congress

would have like power with the Territories and outside of State lines, for there the legislative power of Congress is limited only by the provisions of the Constitution and can not conflict with the reserved power of the States.

That difference in matter of action on its, or his, part follow from this difference of position occupied by a common carrier engaged in State or interstate commerce and a person engaged in private business is stated by Mr. Justice Peckham in the case of United States *v.* Trans-Missouri Freight Association (166 U. S., 321) in these words:

The company (a railroad company) may not charge unreasonable prices for transportation, nor can it make unjust discriminations, nor select its patrons, nor go out of business when it chooses, while a mere trading or manufacturing company may do all these things.

It would seem also that difference in the matter of the right to the State or United States to control follows therefrom.

In the case of Cotting *v.* Goddard (183 U. S., 79) Mr. Justice Brewer intimated that there might be a difference in this particular as to property rights. He said:

Now, in the light of these decisions and facts, it is insisted that the same rule as to the limit of judicial interference must apply in cases in which a public service is distinctly intended and rendered and in those in which, without any intent of public service, the owners have placed their property in such a position that the public has an interest in its use. Obviously there is a difference in the conditions of these cases. In the one the owner has intentionally devoted his property to the discharge of a public service. In the other he has placed his property in such a position that, willingly or unwillingly, the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the State. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the State itself; in the other, that he submits to only those necessary interferences and regulations which the public interests require. In the one he expresses his willingness to do the work of the State, aware that the State in the discharge of its public duties is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a larger general interest. At any rate, it does not perform its services with the single idea of profit. Its thought is the general public welfare. If in such a case an individual is willing to undertake the work of the State, may it not be urged that he in a measure subjects himself to the same rules of action, and that if the body which express the judgment of the State believes that the particular services should be rendered without profit he is not at liberty to complain? While we have said again and again that one volunteering to do such services can not be compelled to expose his property to confiscation, that he can not be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the State may do the work without profit, if he voluntarily undertakes to act for the State he must submit to a like determination as to the paramount interests of the public?

By referring to this statement I do not commit myself to the idea it may be thought to favor. Rather I would be inclined to think that if a State or the United States declines itself to perform this public function and permits and, as it were, invites others to perform it, and to make an investment of time, thought, labor, and capital in its performance, such persons should be entitled to a fair and reasonable return on the investment, and that this right could not be taken from them without just compensation. Such may be said to have been a term in the implied understanding of the parties to the permission or invitation at the time of its acceptance.

But it seems to me clear that there is a difference in this particular as to liberty of action by such common carrier or person. Whatever may be the control that a State or the United States has over a person engaged in private business in the matter of his liberty of action, it is reasonable to hold that it has sufficient control over a common carrier in the matter of its liberty of action as to enable it to bring about an efficient performance of the public function with which it is intrusted, and to prevent action on its part that may cause an interruption in the performance thereof, and this on the ground that another term in that understanding is that it, the common carrier, would perform the public function intrusted to it to the very best advantage, and that the State or United States, as the case might be, reserved to itself the power thereafter to control it to an extent reasonably necessary to secure that result. Amongst the things which Mr. Justice Brown said in the quotation above made from his opinion in the case of L. & N. R. Co. *v.* Kentucky, had been held too often to be thus open to question, was "that railways were subject to control for the common good."

And in the case of Charlotte C. & A. R. Co. *v.* Gibbs, supra, Mr. Justice Field referred to what followed from the nature of the function performed by railroad corporations in these words:

> Being the recipients of special privileges from the State, to be exercised in the interest of the public, and assuming the obligations thus mentioned, their business is deemed affected with a public use, and to the extent of that use is subject to legislative regulation. (Georgia Railroad and Banking Co. *v.* Smith, 128 U. S., 174, 179.) That regulation may extend to all measures deemed essential, not merely to secure the safety of passengers and freight, but to promote the convenience of the public in the transaction of business with them and to prevent abuses of extortionate charges and unjust discrimination. It may embrace a general supervision of the operation of their roads, which may be exercised by direct legislation, commanding or forbidding under severe penalties the doing or omission of particular acts, or it may be exercised through commissioners specially appointed for that purpose. The mode or manner of regulation is a matter of legislative discretion.

If this line of reasoning is sound, then said section is not within the fifth amendment. It is not reasonable or proper that the liberty

of action of a common carrier engaged in interstate commerce in the particulars covered thereby should be beyond the control of Congress under its commercial power. It is not such liberty of action as is protected thereby against the exercise of said power, in that it is action calculated to provoke strikes, boycotts, and lockouts and cause an interruption and cessation of interstate commerce. The one particular, more than any other, in which such common carrier's liberty of action seems to be within the control of Congress under its commercial power is in doing that which will or may obstruct such commerce.

As we have seen Congress has power to prevent obstruction thereof by contracts reasonably restraining it, entered into between competing common carriers. And so great is its power here that it can prohibit such contracts when made by persons not exercising any public function. Had the United States itself exercised this public function, there can be no question that legislation of this character affecting officials would be entirely legal. There is no reason why the fact that it has entrusted its performance to a private corporation should make any difference.

The only possible ground for holding that said section is in violation of the fifth amendment is that it has no real and substantial relation to the free course of interstate commerce. I believe that it has such relation thereto. At the very least I can not say that it has not. I am constrained, therefore, to hold that said section is not unconstitutional for this reason.

Still another reason urged in support of the position that said section is unconstitutional is that it penalizes a common carrier engaged in interstate commerce for discharging an employee because of his membership in a labor organization or otherwise discriminating against him on that ground without reference to the fact whether he is engaged in interstate commerce or solely in intrastate commerce.

This court takes judicial knowledge of the fact that the Louisville and Nashville Railroad Company, a common carrier engaged in interstate commerce and whose master mechanic is charged with a violation of said section in the indictment herein, operates trains over its railroad solely in Kentucky. It operates such trains between Louisville and Lexington and between Lexington and Maysville, and possibly elsewhere. It is claimed that by said section it is made an offense for said company or any officer, agent, or employee thereof, to discharge or otherwise discriminate against an employee so engaged solely upon any of said intrastate trains, because of such membership—that it is penalized by the very same words that such discriminating action as to an employee engaged in interstate commerce is penalized—that I have no power to limit this broad language to employees not engaged on intrastate trains, and that therefore the

whole section must fall. The cases of U. S. *v.* Steffins (the Trade-Mark Cases, 100 U. S., 82); U. S. *v.* Harris (106 U. S., 629), and Baldwin *v.* Frank (120 U. S., 678), are cited in support of the next to the last of these several propositions. To the same effect are the following cases, to wit: Pullman Co. *v.* Allen (191 U. S., 171), and Illinois Central Ry. Co. *v.* McKendree (203 U. S., 514). Of course the doctrine of those cases must be accepted as sound, but they have no application here.

It is not likely that the employees of a railway common carrier engaged in interstate commerce, employed solely upon intrastate trains, do not have anything to do in the course of their employment with interstate commerce, i. e., that such employees, though exclusively so engaged, are not in reality also adjuncts of interstate commerce. It is so unlikely that I would not be disposed to overthrow the section in question, if such fact would render it unconstitutional, without further information that such was the case. Said section was enacted in view of existing conditions, and its validity would not be affected by an imaginary as distinguished from a real state of things. Take, for instance, the intrastate trains of the Louisville and Nashville Railroad Company operating between Louisville and Lexington and between Lexington and Maysville. That company operates no interstate trains over said portions of its railroad. In consequence said intrastate trains do an interstate commerce business, and, no doubt, a very large business of that character. Frequently, if not always, the intrastate freight trains operated thereon the interstate cars passing between points thereon and points on its Memphis, Nashville and Knoxville branches to the south of Kentucky. The same is true as to the intrastate passenger trains operated thereon. Beyond question they do a large interstate passenger and express business between said points. Undoubtedly there is a breakage in the passage at Louisville and Paris, but the passage is under one contract and for continuous service. The employees on such trains therefore, though adjuncts of intrastate commerce, are at the very same time adjuncts of interstate commerce. If, then, Congress, under its commercial power, has no right to penalize a common carrier of interstate commerce for such discriminating action save only as to interstate employees, the fact that said section applies to such employees who are also intrastate employees can not invalidate it.

In the case of the Daniel Ball (10 Wall., 557) Mr. Justice Field said:

> The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation it is subject to the regulation of Congress.

The only likelihood of an intrastate train of an interstate carrier not doing any interstate business under any circumstances would be where such train was operated over that portion of the road over which interstate trains ran also.

But, again, if it be conceded that there is such a thing in this country as employees of a common carrier engaged in interstate commerce who are adjuncts solely of intrastate commerce, and that to *invalidate* an act of Congress penalizing such discriminating action toward such employees would be unconstitutional, there is room to hold that the section in question admits of a construction limiting its application to employees who are wholly or partially adjuncts of interstate commerce, notwithstanding the sweeping language in the first section providing that "the term employees as used in this act shall include all persons actually engaged in any capacity in train operation or train service of any description." It is a cardinal rule of construction that where legislation admits of two constructions, one of which would uphold and the other invalid it, the former will be adopted. Such a construction may be justified by the evident intent of Congress to be drawn from its title and all its provisions to keep within its commercial power.

There is nothing in any of said decisions relied on here against such a position. I understand the indictment to charge that Coppage, the employee whom it is alleged was discriminated against, was an employee engaged in interstate commerce.

But it is not entirely clear that an act of Congress penalizing such action toward such employees would be unconstitutional. It would not be the action of a common carrier engaged in intrastate commerce that would be so penalized, but the action of a common carrier engaged in interstate commerce who also did an intrastate business. Such action toward an employee engaged in the intrastate department of its business would be as likely to cause an interruption in or embarrassment of its interstate department as like action toward an employee engaged in the latter.

In the case of Gibbons *v.* Ogden, Mr. Chief Justice Marshall said:

> The genius and character of the whole Government seems to be that its action is to be applied to all the external concerns of the nation and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, *which do not affect other States and with which it is not necessary to interfere for the purpose of executing some of the general* powers of the Government. The completely internal commerce of a State, then, may be considered as reserved to the State itself.

And again:

> It is obvious that the Government of the Union in the exercise of its express powers—that, for example, of regulating commerce with foreign nations and among the States—may use means that may also be employed by a State in

the exercise of its acknowledged power—that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another in the same State, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State or to act directly on its system of police.

It seems to me, therefore, that the section in question herein is not unconstitutional for this reason.

A final reason urged in support of the contention that it is unconstitutional is that it is class legislation, in that it confers privileges upon union labor that are not conferred upon nonunion labor. In other words, the claim is that it denies to nonunion labor the equal protection of the laws. But I find no provision in the Federal Constitution prohibiting class legislation, i. e., prohibiting Congress from denying one the equal protection of the laws. The provision in the fourteenth amendment applies only to State action amounting to such denial.

I would not, however, commit myself to the proposition that Congress can deny one the equal protection of the laws. It is too serious a matter to dispose of upon the very slight consideration which I have given the matter. The necessities of this case do not require that I should dispose of this question herein. The section in question does not come within such a prohibition even if there was one affecting Congressional action. Such a prohibition would not prevent all discrimination, but only such as was arbitrary and not reasonable—that is, not based on some reason of public policy. The discrimination here, so far as it exists, is based on a reason of public policy. The purpose of the legislation, as we have seen, was to prevent an interruption of interstate commerce. The discriminating action on the part of a common carrier engaged in interstate commerce toward an employee, prohibited by the section, is liable to bring about such an interruption. Like discriminating action toward an employee who is not a member of a labor organization is not liable to produce any such result. There is nobody to back him up in his complaints and demands, or means by which he can bring about such interruption.

It will not do to overlook the fact that Congress in enacting the legislation in question viewed it not from the standpoint of the labor organization but from its own. That standpoint was the interest of interstate commerce committed to its charge by the Federal Constitution.

This reason, then, does not meet my approval. I am constrained to hold, therefore, that said section is constitutional.

In disposing of the question I have borne along with me two general considerations. One is that I am not concerned with the policy of said legislation—only with its constitutionality. The other is that

I have no right to hold an act of Congress unconstitutional unless it is clearly so. It seems to me that these two considerations in connection with those handled in detail are sufficient to demand of me that I uphold said law.

The matter has been considered elsewhere in two cases. In the case of United States *v.* Hill, an indictment found in the district of Massachusetts under said section, in 1899, Judge Lowell overruled a demurrer thereto and submitted the matter to a jury, which hung. There seems to have been no further trial of the case. He delivered no opinion as to its constitutionality. His action, however, involved its being constitutional.

In the case of United States *v.* Scott (148 Fed., 431) Judge Evans, of the western district of this State, a prosecution against an employee of the Louisville and Nashville Railroad Company, held the section unconstitutional. A comparison of his opinion with this will indicate wherein we differ.

The demurrer is overruled.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

No. [redacted]. 216.

DAMSELLE HOWARD, Administratrix of Will Howard, deceased, *Plaintiff in Error.* *vs.* **ILLINOIS CENTRAL RAILROAD COMPANY and The YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.**	In Error to the Circuit Court of the United States for the Western District of Tennessee.

BRIEF FOR DEFENDANTS IN ERROR.

CHARLES N. BURCH,
BLEWETT LEE,
J. M. DICKINSON,
Attorneys for Defendants in Error.

GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

No. 587.

DAMSELLE HOWARD, Administratrix of Will Howard, deceased, *Plaintiff in Error.* *vs.* **ILLINOIS CENTRAL RAILROAD COMPANY and The YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.**	In Error to the Circuit Court of the United States for the Western District of Tennessee.

BRIEF ON BEHALF OF THE ILLINOIS CENTRAL RAILROAD COMPANY AND THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

STATEMENT.

This is an action to recover damages on account of personal injuries resulting in death. It was instituted in the Circuit Court of Shelby County, Tennessee, on July 19, 1906, against the defendants in error and J. D. Trimble, and was properly removed to the United

States Circuit Court for the Western Division of the Western District of Tennessee. After the removal, the defendant railroad companies filed pleas of the general issue and contributory negligence, but they were afterwards, by leave of the court, withdrawn as of the day filed. (R., 14.)

By leave of the court, the plaintiff filed an amended declaration, so as to allow the case to proceed in the name of Damselle Howard, administratrix of the estate of Will Howard, deceased, it being made to appear to the court that Damselle Howard, the plaintiff and widow of Will Howard, deceased, was appointed administratrix of the estate of Will Howard by the Probate Court of Shelby County, Tennessee, on the 18th day of July, 1906, which was the day previous to the institution of this suit.

The suit was dismissed as to defendant Trimble. (R., 16.)

The defendant railroad companies filed a demurrer to the amended declaration, which challenged the constitutionality of the Act of Congress, approved June 11, 1906, commonly known as the Employers' Liability Act. An order was entered allowing the department of justice of the United States to intervene for the purpose of supporting the constitutionality of said act. The plaintiff, by leave of the court, amended her amended declaration in several minor particulars and also so as to show that the negligence of the defendants complained of was that of a fellow-servant of said Will Howard, to wit, the engineer of the interstate train, upon which Will Howard was acting as fireman; and also to show that plaintiff bases her right of action

exclusively upon the Act of Congress approved June 11, 1906, and entitled "An Act relating to liability of common carriers in the District of Columbia and territories and common carriers engaged in commerce between the states and between states and foreign nations to their employes."

The declaration, as finally amended, is as follows:

"Leave of the court having first been had and obtained, comes now the plaintiff and files this her amended declaration, and for amendment says:

Plaintiff, Damselle Howard, administratrix of the estate of Will Howard, deceased, suing the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, defendants, declares that plaintiff is a resident citizen of Shelby County, Tennessee, and is the duly appointed, qualified, and acting administratrix of the estate of Will Howard, deceased, and her letters of administration issued out of the Probate Court of Shelby County, Tennessee, are here to the court shown; and the defendants are railroad corporations engaged in interstate trade and commerce between the several states of the union, and especially between the States of Tennessee and Mississippi.

Heretofore, the said Will Howard, deceased, plaintiff's intestate, was in the employ of the defendant as a fireman upon one of their interstate passenger trains, to wit, a passenger train running between the City of Memphis, in the State of Tennessee, and various points in the State of Mississippi; and on or about the 27th day of June, 1906, while the said Will Howard was engaged in the performance of his duties as fireman for the defendants, the defendants so negligently conducted themselves, and so negligently managed the operation of their said train, that their said train was caused to collide with another engine and train of cars in Shelby County, Tennessee, which said

collision negligently produced as aforesaid inflicted upon plaintiff severe and fatal injuries, from the result of which he lingered and died.

The negligence of the defendants consisted in the operation of their said train by a fellow-servant of deceased, to wit, the engineer on said interstate train, so as to produce a collision, without fault upon the part of the deceased, Will Howard, and while the said Will Howard was in the exercise of due care and diligence. Wherefore, the plaintiff has a right of action and sues the defendants under and by virtue of an Act of Congress, approved June 11, 1906, and entitled 'An Act relating to liability of common carriers in the District of Columbia and territories and common carriers engaged in commerce between the states and between the states and foreign nations to their employes.'

That said deceased left surviving him a widow, Damselle Howard, plaintiff, and an infant child, Willie May Queen Victoria Howard. He was a man in vigorous health, industrious, sober, domestic and provident.

Wherefore, plaintiff has been damaged in the sum of twenty thousand ($20,000) dollars, for which she sues and demands a trial by jury." (R., 16.)

The demurrer is as follows:

"The Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, for demurrer to the amended declaration filed in this cause, say:

* * * * *

The amended declaration, in so far as it is based on the act of Congress approved June 11, 1906, and entitled 'An act relating to liability of common carriers in the District of Columbia and territories and common carriers engaged in commerce between the states and between the states and foreign nations to their employes,' states no

cause of action for the reason that said act of Congress is unconstitutional and void, in that—

(a) Congress was without power to pass said act.

(b) Said act is not a regulation of commerce with foreign nations and among the several states and among the Indian tribes, and not within the power of Congress to enact under article 1, section 8, subsection 3, of the Constitution of the United States.

(c) Said act fails to prescribe any rules of conduct as to common carriers engaged in interstate commerce and to fix criminal or civil liability upon common carriers for failure to comply with such rules of conduct, but without regulating interstate commerce is an attempt to establish the administration of the law of torts as between common carriers and their employes.

(d) Said act makes no distinction between the liability of common carriers to their servants, who may at the time be engaged in interstate commerce, and the liability of common carriers to their servants who may at the time be engaged in intrastate commerce, and the liability of common carriers to their servants who may at the time not be engaged in commerce at all; but the sole test of liability is made to depend upon whether the common carrier engages in interstate commerce.

(e) Said act is a regulation of intrastate commerce.

(f) Said act is in contravention of the ninth amendment of the Constitution of the United States, reading as follows: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

(g) Said act is in contravention of the tenth amendment of the Constitution of the United States, reading as follows:

'The powers not delegated to the United States by the Constitution, nor prohibited by it to the

state, are reserved to the states respectively, or to the people.'

(h) In said act Congress attempts to exercise powers and rights which never have been delegated to the United States by the Constitution of the United States, said powers and rights being retained by the people and reserved to the states and the people.

(i) Said act violates that portion of the fifth amendment to the Constitution of the United States which prohibits any person from being deprived of life, liberty, or property without due process of law.

(j) Said act makes an arbitrary and capricious classification of all common carriers engaged in interstate commerce, regardless of whether the operations of all common carriers are dangerous or not.

(k) Said act imposes different and greater liability upon common carriers engaged in interstate commerce than upon other persons engaged in interstate commerce, and takes away from common carriers engaged in interstate commerce defenses of personal injury suits available to other persons engaged in interstate commerce.

(l) Said act violates the seventh amendment of the Constitution of the United States, reading as follows:

'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.'

(m) Said act prohibits the rules of the common law being applied in the re-examination in any court of the United States in any case arising under said act." (R., 11-13.)

The court held that the act approved June 11, 1906,

was unconstitutional and void, sustained the demurrer and dismissed the suit. (Opinion, R. 17 *et seq.*)

The plaintiff in error assigned errors as follows:

> "That the court was of opinion and held and adjudged that the act of Congress approved June 11, 1906, entitled, 'An Act relating to liability of common carriers engaged in commerce between the states and between the states and foreign nations, to their employes,' is unconstitutional and void, so far as it is applicable to her cause of action, and so far as it undertakes to confer upon her a right of action, for the causes stated in her declaration, and on that ground sustaining the said demurrer and dismissing her said suit, all as more fully appears by the judgment of record in this suit, which is here referred to as part of this assignment." (Rec., 27.)

POINTS AND ARGUMENT.

I.

THE ACT IS NOT A REGULATION OF COMMERCE AND IS THEREFORE UNCONSTITUTIONAL AND VOID.

The Constitution of the United States, in Article 1, section 8, clause 3, provides, that "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The power to pass the act in question must be predicated upon this section of the Constitution.

In order that we may understand more clearly the object of the commerce clause of the Constitution, it may be well to observe at the outset its purpose.

In *Gibbons* v. *Ogden,* 9 Wheaton, 195, Mr. Chief Justice Marshall said:

> "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.
>
> "The completely internal commerce of a state, then, may be considered as reserved for the state itself." (p. 195.)

In the case of *Veazie & Young* v. *Moor,* 14 Howard, 568, Mr. Justice Daniel uses this language:

> "The rule here given with respect to the regulation of foreign commerce, equally excludes from

the regulation of commerce between the states and the Indian tribes, the control over turnpikes, canals, or railroads, or the clearing and deepening of watercourses exclusively within the states or the management of the transportation upon and by means of such improvements. In truth, the power vested in Congress by Article 1, section 8 of the Constitution, was not designed to operate upon matters like those embraced in the statute of the State of Maine, and which are essentially local in their nature and extent. *The design and object of that power, as evinced in the history of the Constitution, was to establish a perfect equality amongst the several states as to commercial rights and to prevent unjust and invidious distinctions, which local jealousies, or local and partial interests might be disposed to introduce and maintain.*" (p. 574.)

The same idea is expressed by Mr. Justice Field in *Railroad Company* v. *Richmond*, 19 Wallace, 584, wherein he says:

> "The power to regulate commerce among the several states was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation; it was never intended that the power should be so exercised *as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse.*" (p. 589.)

Under the articles of confederation the power to regulate commerce was reserved to each state, with the exception that Congress had power to make commercial treaties and to regulate trade with the Indians. We learn from the *Federalist* the chaotic condition in which this left the States of the Confederation. Each state competed with every other for advantages in the trade with foreign countries, and the hostile regula-

tions of commerce by European countries, and especially Great Britian, made a general public sentiment in favor of uniform regulations of commerce, and hence in the adoption of the Constitution the power to regulate commerce, not only with foreign nations and with the Indian tribes, but also among the several states, was granted to the national government.

John Randolph Tucker on Constitution of United States, section 250.

In considering the power of Congress to enact any legislation whatever, it is always to be borne in mind that the government of the United States is one of enumerated powers, and unless authority can be found in the national Constitution for the enactment of any particular legislation, then such authority does not exist. The Constitution of the United States specifies what powers Congress has and it has those powers therein specified and none other, except, such as are necessarily implied to carry into effect those which are granted.

Cooley's Constitutional Limitations, page 11, 7th Ed.

In granting to the national government the power to regulate commerce among the several states each state was surrendering a portion of its sovereignty, and it cannot be considered for a moment that any state surrendered any greater power than the words *"to regulate commerce among the several states"* necessarily imply.

The Supreme Court of the United States has defined the phrase "to regulate commerce," and its defi-

nition is the natural one which every one would expect. In *Gibbons* v. *Ogden* Mr. Chief Justice Marshall says:

> "We are now arrived at the inquiry, what is this power? It is the power to regulate, that is, to prescribe the rule by which commerce is to be governed." (p. 196.)

And again in *Welton* v. *Mo.*, 91 U. S., 275, this court has said:

> "To regulate commerce is to prescribe rules by which it shall be governed." (p. 279.)

See also the *Lottery case*, 188 U. S., 321.

As further illustrating the correct construction of this section of the Constitution, it is not inappropriate to notice what that section does *not* mean.

In *Williams* v. *Fears*, 179 U. S., 270, Mr. Chief Justice Fuller says:

> "If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature." (p. 278.)

It is also to be remembered that this power of Congress must be exercised in a constitutional way. It is not destructive of the rights and guaranties which are to be found in other sections of the Constitution and the amendments thereto. The power to regulate commerce cannot be so exercised as to deprive a citizen of property without due process of law, but must be exer-

cised in subordination to the limitations and guaranties of the Constitution.

Thus, in the case of *Monongahela Navigation Company* v. *United States*, 148 U. S., 312, it appeared that an act had been passed by Congress authorizing the condemnation of a lock and dam in the Monongahela river belonging to the Monongahela Navigation Company, and the act provided for the payment for the lock and dam but prohibited the payment of any amount on account of the impairment of the franchise of the Navigation Company to collect tolls. The Supreme Court held that while Congress had ample power under the commerce clause of the Constitution to condemn and appropriate the lock and dam of the Navigation Company, yet that such power was in subordination to the limitations imposed by the fifth amendment to the Constitution of the United States prohibiting the taking of property for public use without just compensation, and that the franchise to take tolls was as much a vested right of property as the ownership of tangible property, and that in the application of the statute the court was not concluded by the provision prohibiting the payment of any amount on account of the franchise of the Navigation Company.

The court said:

> "The right of the national government, under its grant of power to regulate commerce to condemn and appropriate this lock and dam belonging to the Navigation Company is subject to the limitations imposed by the fifth amendment which provides that property shall not be taken for public uses without just compensation." (p. 345.)

The attention of the court is called to this case

merely to emphasize the idea that, while Congress in the regulation of commerce among the states has plenary power, yet that power must be exercised in a constitutional way and so as not to violate other sections of the Constitution and the amendments thereto.

Coming now to the act in question,—let us examine it to ascertain if it is a regulation of interstate commerce.

The title is as follows:

> "An act relating to liability of common carriers in the District of Columbia and territories and common carriers engaged in commerce between the states and between the states and foreign nations to their employes."

It is apparent that no rule is here indicated for the regulation of interstate commerce. The title shows that the object of the act is to define the liability of interstate carriers to their employes, and there can be no doubt from a reading of the whole act that this is its purpose.

The first section, in substance, provides that every common carrier engaged in interstate commerce shall be liable to any of its employes, or in case of his death, to his personal representative, for all damages which may result from the negligence of any of its officers, agents or employes or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, ways or works. Certainly there is no rule here prescribed by which commerce is to be governed. It lays down no rule as to the time, manner, or condition under which it is to be transported, or as to the means or

instrumentalities, animate or inanimate, which shall be employed. It does not prescribe the character of employes, whom the common carrier must engage in its service, the kind of equipment which shall be used, the nature of its roadbed or the conditions under which it shall be used. It lays down no rule whatever for the guidance of the common carrier in the transportation of interstate commerce. It does not prescribe nor prohibit any means, instrumentalities or methods. It simply defines the liability of common carriers, engaged in interstate commerce, to their employes. If it had provided that common carriers, engaged in interstate commerce, should not restrict their common law liability as common carriers, or should not employ as engineer of railway trains any man who is not able-bodied, or over twenty-one or under sixty years of age, or who could not distinguish a red from a white signal, then we could understand how such legislation would be a regulation of commerce. It leaves the whole field of regulation untouched and every possible vice in respect of the carrying of interstate commerce, whether of persons, or things, might intervene without becoming in the least obnoxious to this act.

It prescribes no rule for the regulation of commerce, whether commerce be understood to be either traffic or intercourse. It defines the liability of an interstate carrier to his employes, creates new rights of action in favor of such employes, and takes away from the common carrier defenses heretofore available. We submit that such legislation is not a regulation of commerce, and that Congress has no more power to define the liability of common carriers, engaged in

interstate commerce to their employes than it has power to legislate on the domestic relations of merchants engaged in interstate commerce. If Congress has the power to define the liability of interstate carriers to their employes, then likewise it has the power to define the liability of merchants engaged in interstate commerce to their employes, and the relations and liabilities of merchants engaged in interstate commerce to persons for whom such merchants may be acting as guardians. The argument that this act is a constitutional regulation of interstate commerce proceeds upon the fundamentally erroneous theory that Congress has power to regulate persons engaged in interstate commerce in all the relations of life,—whereas, the power conferred by the constitution is only the regulation of the commerce itself.

The Safety Appliance Acts.

No argument to sustain the constitutionality of the act in question can draw any support from the Safety Appliance Acts. These acts consist of an act approved March 2, 1893, as amended by an act approved April 1, 1896, and again amended March 2, 1903. The title is as follows:

> "An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes."

The constitutionality of the Safety Appliance Acts has never been drawn in question, nor adjudicated, but, assuming for the sake of argument, that said acts are

constitutional, the difference between them and the Employers' Liability Act is apparent. The Employers' Liability Act, as already shown, provides no rule for the conduct of commerce, or any qualification as to the instrumentalities of commerce. On the other hand, the Safety Appliance Acts, with great definiteness, lay down rules as to the character of instrumentalities to be used in the movement of interstate commerce.

The first section provides that it shall be unlawful for any common carrier, engaged in interstate commerce, to use any locomotive in moving interstate traffic unless it is equipped with a power wheel brake and appliances for operating a train brake system, and to run any train in interstate traffic that has not a sufficient number of cars equipped with power or train brakes, so that the engineer can control the speed of the train without requiring brakemen to use hand-brakes.

The second section makes it unlawful to use in moving interstate traffic any cars not equipped with automatic couplers, so as to prevent the necessity of brakemen going between the cars.

The third section gives common carriers the right to refuse to receive cars from other roads not equipped in accordance with the provisions of the act.

The fourth section makes it unlawful to use in interstate traffic cars not provided with grab-irons and hand-holds.

The fifth section authorizes the Interstate Commerce Commission to designate a standard height of draw-bars.

The sixth section makes any railroad company violating the act subject to a penalty of $100.

The seventh section authorizes the Commission to extend the time for compliance by common carriers with the provisions of the act.

The eighth section provides as follows:

> "That any employe of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

The act is amended by an act, approved March 2, 1903, so as to require the automatic coupling of couplers, whether they be of the same kind or not, and so as to require at least fifty per cent (50%) of the cars in any train to be equipped with power brakes.

From this statement it is readily seen that definite rules governing the instrumentalities of interstate commerce are laid down. It is true that a right of recovery is declared by the eighth section of the Safety Appliance Act, which did not theretofore exist, but this right of action is declared only for the infraction of the rules previously laid down in the act. This right of action can be eliminated without impairing the regulating features. The Safety Appliance Acts do not create a right of action alone. As to them, it might be held that inasmuch as Congress, acting within the power conferred by the commerce clause of the Constitution, prescribed definite rules of conduct for common carriers, therefore, it could, as a

means for enforcing such rules, give a right of action in favor of any person injured through a noncompliance with such rules.

Undoubtedly Congress has power to enact laws to carry into effect and to execute other laws, which it may constitutionally enact.

Under this power Congress, after laying down rules which are constitutionally enacted under the commerce clause of the Constitution, would have power to pass laws necessary and proper for carrying such rules into execution, but this is far from meaning that Congress, under the guise of carrying into execution any laws which it might constitutionally enact, could enact any legislation which it saw fit for carrying such laws into execution.

The language of the Constitution is, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." In other words, the laws which carry into execution the constitutional powers of the Government, must be necessary and proper; that is, they must be appropriate. As was said by Chief Justice Chase, in *Hepburn* v. *Griswold*, 8 Wall., 603.

> "It must be taken then as finally settled, so far as judicial decisions can settle anything, that the words 'all laws necessary and proper for carrying into execution' powers expressly granted or vested, have, in the Constitution, a sense equivalent to that of the words, laws, not absolutely necessary indeed, but appropriate, plainly adapted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to effect objects intrusted to the government." (p. 615.)

It was announced with equal emphasis in *Martin* v. *Hunter's Lessee,* 1 Wheat., 304, by Mr. Justice Story, speaking for the entire court, that "The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." (p. 326.)

Clearly it would not be constitutional for Congress under the guise of the power conferred by the eighteenth paragraph of Article I, section 3 of the Constitution, to provide in the Interstate Commerce Act that any shipper violating the provisions of that act should be liable to his employes for all injuries sustained by them regardless of circumstances, or to provide that such delinquency of the shipper should be a ground of divorce. It would seem that the necessary and proper method of making effective the Safety Appliance Acts would be by fine and penalty. That the giving of a right of recovery to an injured employe is a proper and necessary method for making effective the Safety Appliance Acts is a proposition which can well be debated and which we do not admit.

As was said by Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat., 316:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, *under the pretext of executing its powers,* pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." (p. 423.)

And again, it was said by Chief Justice Marshall in *Wayman* v. *Southard*, 10 Wheat., 50:

> *"It is a general rule, that what cannot be done directly from defect of power, cannot be done indirectly."*

Without, therefore, admitting the constitutionality of section eight (8) of the Safety Appliance Act, it is apparent that even if said section be constitutional it furnishes no support to the constitutionality of the Employers' Liability Act for the reason repeatedly pointed out above,—that in the former act rules regulating commerce are prescribed, whereas, in the latter act, there are no such rules.

The court will determine for itself whether or not merely giving a right of action against common carriers of interstate commerce to their employes is of itself a regulation of commerce.

In *Mugler* v. *Kansas*, 123 U. S., 623, the court said:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." (P. 661.)

In *Minnesota* v. *Barber*, 136 U. S., 313, the court said:

> "The presumption that this statute was enacted, in good faith, for the purpose expressed in

the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this court. In *Henderson, &c.* v. *New York, &c.*, 92 U. S., 259, 268, where a statute of New York imposing burdensome and almost impossible conditions on the landing of passengers from vessels employed in foreign commerce, was held to be unconstitutional and void as a regulation of such commerce, the court said that 'in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' In *People* v. *Compagnie Générale Translantique*, 107 U. S., 59, 63, where the question was as to the validity of a statute of the same state, which was attempted to be supported as an inspection law authorized by section 10 of article 1 of the Constitution, and was so designated in its title, it was said: 'A state cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title.'" (Pp. 319, 320.) * * *

"Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or

natural operation it impairs or destroys rights secured by the Constitution of the United States." (p. 320.)

In *Hennington* v. *Georgia*, 163 U. S., 299, the court said:

> "In what light is the statute of Georgia to be regarded? The well settled rule is, that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution. *Mugler* v. *Kansas*, 123 U. S., 623, 661; *Minnesota* v. *Barber*, 136 U. S., 313, 350." (Pp. 303, 304.)

In the Safety Appliance Acts the primary object was regulation looking to the safety of the public and employes engaged in interstate commerce. Liability to the employe was subordinate and incidental and can be sustained alone upon the theory that it was a proper and legitimate means for enforcing the regulation features. Here the primary and only feature is liability to employes. The plain purpose of the act, which was passed in compliance with the demand of labor unions, was to enlarge the liability of the employer. Its effect upon the carriage of interstate commerce is remote and conjectural. Instead of exercising a constitutional power with incidental adjuncts, which may be sustained as branches of the parent stem, the process is reversed and what is in its nature incidental, subordinate and remedial, is enacted for its own sake, and when assailed is justified because it may possibly, in some indefinite way, operate to secure results which Congress might have provided for by regulation.

In *Sherlock* v. *Alling*, 93 U. S., 99, there was a writ of error to the Supreme Court of Indiana from the Supreme Court of the United States involving a judgment which had been affirmed by the Supreme Court of Indiana in favor of the administrator of a party, who had been killed in a collision between two steamboats on the Ohio river, engaged in interstate commerce, the collision having occured within the territorial jurisdiction of the State of Indiana. It appeared that there was a statute of Indiana giving a right of action to the administrator of a party who had met his death by a wrongful act. The contention was that this act could not apply to common carriers engaged in interstate commerce for the reason that it was a regulation of interstate commerce.

After referring to the cases of *Brown* v. *Maryland*, 12 Wheat., 425, *State Tonnage Tax Cases*, 12 Wallace, 204, and *Welton* v. *Missouri*, 90 U. S., 275, in which legislation had been held void on account of imposing a tax or license, or condition upon interstate commerce, the court, holding that said statute was not a regulation of interstate commerce, said:

> "That statute imposes no tax, prescribes no duty, and in no respect interferes with any regulation for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the state, for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the state, whether on land or on water. General legislation of this kind, prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid

> objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend, or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislation on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." (P. 103.)

Thus state statutes, giving rights of action for torts against interstate carriers, are not regulations of interstate commerce. That being true, it follows that a Federal statute, which provides for giving rights of action against interstate carriers in favor of their employes, is likewise not a regulation of interstate commerce.

The above decision further confirms this view.

Said the court:

> "The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the state to which the vessels belong; and it may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or

> engaged in commerce, foreign or interstate, or in any other pursuit." (P. 104.)

The court in this case, after referring to the rules and regulations adopted by Congress covering the navigation of vessels, rules as to the character of those who shall navigate them, rules to be observed in passing each other and rules to be observed for the safety of the crews, uses the following expressions:

> "Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of the opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress." (P. 104.)

This was not necessary for the decision of the case and is *dictum*. No Federal legislation was involved.

Chief Justice Marshall, in *Cohens* v. *Virginia*, 6 Wheat., 260, said:

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." (p. 399.)

This has been approved in the following cases:

Carroll v. *Lessees of Carroll,* 16 How., 275.

Northern Bank of Toledo v. *Porter,* 110 U. S., 608.

Leisy v. *Hardin,* 135 U. S., 135.

Pollock v. *Farmers' Loan & Trust Co.,* 157 U. S., 574.

United States v. *Wong Kim Ark.,* 169 U. S., 679.

Downes v. *Bidwell,* 182 U. S., 258.

It will be seen, however, that under the decisions the right of the Government to define liability for torts presupposes that the Government had laid down certain rules, for the infraction of which a liability is created. In other words, there is no right to define liability without first stating rules regulating commerce.

In *Smith* v. *Alabama,* 124 U. S., 465, there are general expressions of the court similar to those last quoted from *Sherlock* v. *Alling,* but they must be taken in connection with the question under consideration, and when so understood, no support is found for the proposition that merely giving a right of action to an employe for personal injury is a regulation of commerce. The only proposition decided in the *Smith Case* was that legislation of Alabama, requiring locomotive engineers to be examined and licensed by a State Board was not a regulation of interstate commerce but a valid exercise of the police power of the state. There was no question in either of these cases as to the civil liability of an interstate carrier to one of its servants, nor was there any Federal statute under consideration.

The case of *Pierce* v. *Van Dusen*, 78 Fed., 693, was decided by Mr. Justice Harlan while sitting with the Circuit Court of Appeals for the Sixth Circuit. It was an action for damages against the receiver of a railroad company under an Employers' Liability Act passed by the State of Ohio. It was contended that the act had no application to railroads engaged in interstate commerce, for the reason that such a statute would be a regulation of interstate commerce. The question decided was that the Ohio Employers' Liability Act was not an unlawful regulation of interstate commerce. In the opinion he said:

> "Undoubtedly the whole subject of the liability of interstate railroad companies for the negligence of those in their service may be covered by national legislation enacted by Congress under its power to regulate commerce among the states. But, as Congress has not dealt with that subject, it was competent for Ohio to declare that an employe of any railroad corporation doing business here, including those engaged in commerce among the states, shall be deemed, in respect to his acts within this state, the superior, not the fellow-servant, of other employes placed under his control." (p. 700.)

Upon examining the opinion it will be found that the court based its decision mainly upon *Sherlock* v. *Alling*, 93 U. S., 104; *Smith* v. *Alabama*, 124 U. S., 465, and *N. C. & St. L. Ry.* v. *Alabama*, 128 U. S., 96.

The above excerpt was not necessary for the decision of the point under consideration and to that extent is *obiter dictum*. No Federal regulation was under consideration. The decision itself is no authority for the contention that merely giving a right of ac-

tion to an employe without predicating it upon some prescribed rule is a regulation of commerce.

In *N. C. & St. L. Ry.* v. *Alabama*, 128 U. S., 96, which is relied upon as an authority in *Pierce* v. *Van Dusen*, the Supreme Court of the United States says:

> "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the *qualifications, duties and liabilities of employes* and others on railway trains engaged in that commerce; and that such legislation will supersede any state action on the subject. But until such legislation is had, it is clearly within the competency of the states to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of state and Federal courts, that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the states, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so for as is practicable." (Pp. 99, 100.)

The "liability" referred to is not that of the master to the servant. The Alabama statute under consideration rendered a disqualified employe who served in any of the capacities mentioned liable to fine. The entire act dealt with regulations looking to the public safety and their enforcement. Saying, in such connection, that Congress may legislate as to the qualifications, duties and liabilities of employes and others on railway trains engaged in that commerce, is quite different from saying that Congress may legislate as to the liability of a common carrier to its employes en-

tirely dissociated from any regulative rule or requirement prescribed for carrying on interstate commerce.

In the cases of *N. Y., N. H. & H. R'd Co.* v. *New York,* 165 U. S., 628, and *Western Union Telegraph Co.* v. *James,* 162 U. S., 662, there was not involved any question as to the liability of interstate carriers to their employes, nor was there any federal statute under consideration, but the only question under consideration was as to the validity of certain state statutes enacted under the police power of the state.

The same is true of *Hennington* v. *Georgia,* 163 U. S., 299.

Testing the Act by Assuming That It Provided That There Should Be No Liability.

If Congress has power to define the liability of interstate carriers to their servants, then it follows that it has power to restrict the liability to any extent or to declare that there shall be no liability. Suppose that, instead of the present provisions of Section 1 of the act, it provided in substance that *no* common carrier engaged in interstate commerce should be liable to any of its employes, or in case of his death to his personal representatives, or to any one else, for any damages resulting from the negligence of its officers, agents or employes or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works. It must be admitted that Congress has just as much power to pass an act in the one form as in the other. Congress in its legislative discretion might think that interstate commerce

would be cheaper freed from restraint and less impeded, by relieving common carriers engaged in interstate commerce from the expense and annoyance of litigation with their employes, or that employes would be more cautious and hence better subserve interstate carriage, if they had no recourse on the employers. When considered in this light (and we submit it is not an improper test to be applied) the unconstitutionality of the act becomes all the more apparent.

II.

THE ACT EMBRACES BOTH INTERSTATE AND INTRASTATE COMMERCE, PROPOSES TO EXERCISE AN UNCONSTITUTIONAL POWER OVER INTRASTATE COMMERCE, THE POLICE POWER OF THE STATES, THE POWER OF THE STATES TO REGULATE THE RIGHTS OF THEIR CITIZENS *inter sese* IN MATTERS NOT DIRECTLY AFFECTING INTERSTATE COMMERCE, IS INSEPARABLE AS TO ITS INTERSTATE COMMERCE FEATURES, AND THEREFORE MUST FAIL *in toto*.

The scope of the act.

The first section of the act provides:

> "That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employes, or in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon

him, for all damages which may result from the negligence of any of its officers, agents, or employes, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works."

The words "engaged in trade or commerce * * * between the several States" qualify the words "common carrier" and none other. The test of the application of the act to the carrier in any given case is whether or not the carrier is engaged in interstate trade or commerce. It is not necessary that the injured employe, nor that the employe whose negligence causes the injury, be engaged in or have connection with interstate trade or commerce. The act is for the benefit of "any" employe without qualification, and a cause of action arises from the negligence of "any" employe, without qualification. It is only necessary in any case to show that the carrier is one "engaged" in interstate trade or commerce, that the person injured was an employe of such carrier, and that the injury resulted from the negligence of an officer, agent or employe of such carrier, or by reason of a defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works. It embraces all such carriers, whether individuals or corporations, whether by land or water, and without regard to the particular kind of interstate trade or commerce in which they are engaged. It is not confined to instrumentalities used in carrying on interstate trade or commerce. It says expressly "all damages which may result * * * by reason of any defect or insufficiency due to its negligence in its * * *

machinery, * * * or works." Thus by specific designation it is made applicable to instrumentalities which from their very nature manifestly have no connection whatever with the movement of commerce. It is of common knowledge that railroad companies engaged in interstate trade or commerce operate machinery in repair and construction, and that they have for this purpose works entirely dissociated from transportation. Such works and machinery might be operated by others, and what the railroad companies utilize them for, might be procured by purchase, without in any way affecting the transportation in which they are engaged. Yet under this act, this suit could as well be sustained if the injured person had been a coal heaver at a stationary engine in the shops of the defendant and the injury had come from a fellow coal heaver negligently handling his shovel.

The word "engaged" is likewise unqualified and unrestricted. The act does not require the common carrier to be engaged in interstate trade or commerce at the particular time of the injury, or in regard to the particular transaction out of which the injury arises, but the only test is that the carrier be one engaged in interstate trade or commerce. This necessarily makes practically all of the common carriers of the United States subject to the provisions of the act. A railroad may lie entirely within the limits of a single state and yet, through joint traffic arrangements with other roads, be engaged in interstate trade or commerce. It matters not how little of such carrier's business may be interstate commerce. If

it do any interstate commerce, it is subject to the provisions of the act.

The act embraces an unconstitutional power over intrastate commerce, and the domestic affairs of the states.

All the States, from the beginning of the Government, have assumed the right up to this time to define the relation of master and servant, and to prescribe the liability of the master to the servant, whether the master be engaged in interstate trade or commerce or any other occupation. All give rights of action in cases of death by wrongful act, and have more or less legislation defining the liability of master to servant. This legislation has been administered not only in the courts of the several States, but in the courts of the United States, as applicable to carriers engaged in interstate commerce, and it has been directly held by the Supreme Court of the United States that such legislation is not a regulation of interstate commerce.

Sherlock v. *Alling*, 93 U. S., 99.

If the act under consideration is a regulation of trade or commerce between the States, then all the laws of the several States, so far as they affect employes of those engaged in interstate trade or commerce can be superseded by Congress. The establishment of such a doctrine would be colossal in its reach and radically subversive of existing conditions. The question is stupendous in its possibilities. While the transfer to the national government by the act under consideration of powers heretofore exercised by the States may not in and of itself appear to be serious, the potentiality of the principle by which such trans-

fer is to be effected can hardly be measured. If the liability of carriers engaged in interstate commerce to their employes can be defined by Congress, then the liability of every other person engaged in interstate trade or commerce to his employes may be defined by Congress. The act does not require that the carrier shall be exclusively engaged in interstate commerce, but merely that the carrier shall be one that engages in interstate commerce. It matters not as to the extent to which such carrier engages in interstate commerce. There are but few persons in any State carrying on business who do not engage to some extent in interstate commerce. Those who carry on any important industry are more engaged in interstate trade and commerce than they are in intrastate trade or commerce. There are many merchants whose business is almost exclusively interstate trade or commerce. Merchants of the city of Memphis, where the cause of action in this case arose, by virtue of the location of the city of Memphis at the junction of three States, are mainly engaged in interstate commerce. If the act in question be constitutional, then practically all of the people of the United States engaged in the various industries can be regulated in their liability to their servants, as to contracts with their servants, and as to the duties and qualifications of such servants. The servants can likewise be regulated. These are necessary consequences of the constitutionality of this act, and the door is thereby thrown open for the enactment of legislation by Congress which will practically cover every field of human activity and supersede practically all of the laws of the several States affecting trade and the relations of those en-

gaged in trade. If they can be regulated as to employment, they can be regulated in any other way that may be thought to affect trade and commerce between the States. The result would be that the sovereignty of the States would be shrunk to a simulacrum of its former self. The term "engaged in interstate and foreign trade or commerce" is far reaching and those embraced by it comprise a very large part of our citizenship.

> "The term (commerce) has reference to trade or traffic, and the interchange of commodities, but commerce is more than traffic; it is commercial intercourse between nations and parts of nations, in all its branches. 'Trade' comprehends exchange by barter and buying and selling for money, but commerce is not limited to mere buying and selling; it embraces all commercial intercourse, whether by land or water, and includes communication by telegraph.
>
> 'Transportation is an element of commerce; the transportation of articles of trade for purposes of exchange or sale; transportation of passengers. The handling of subjects of interstate commerce while in transit is a part of the transportation. Commerce does not consist alone in the transportation of articles, but includes also the contracting for the sale of articles, and their delivery in another State, for sale is itself an essential ingredient of intercourse."
>
> Sutherland, Notes on U. S. Constitution, pp. 95, 96.

In *Welton* v. *State of Missouri,* 91 U. S., 275, the court said:

> "Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities

between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states." (p. 280.)

In *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S., 211, the court said:

"As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities." (p. 241.)

The Constitution intended to authorize Congress to regulate interstate and foreign commerce, and not those engaged in such commerce, so as to control them in affairs not directly involved in interstate and foreign commerce.

In *Gibbons* v. *Ogden,* 9 Wheat., 1, Chief Justice Marshall said:

"The subject to which the power is next applied, is to commerce 'among the several States.' The word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

"It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of

a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself." (Pp. 194, 195.)

Also:

"They (inspection laws) act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to a general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

"No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose,

or is clearly incidental to some power which is expressly given. It is obvious that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another in the same State, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police. So if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality." (Pp. 203, 204.)

In the *License Cases,* 5 How., 504, Mr. Chief Justice Taney said:

"It is equally clear, that the power of Congress over this subject does not extend further than the regulation of commerce with foreign nations and among the several States; and that beyond these limits the States have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the general government. Every

State, therefore, *may regulate its own internal traffic,* according to its own judgment and upon its own views of the interest and well-being of its citizens." (P. 574.)

In the same case, Mr. Justice Woodbury said:

"A good reason exists for this, as the subject of buying and selling within a State is one as exclusively belonging to the power of the State over its internal trade, as that to regulate foreign commerce is with the general government, under the broadest construction of that power." (P. 620.)

And again:

"But this license is a regulation neither of domestic commerce between the States, nor of foreign commerce. It does not operate on either, or the imports of either, till they have entered the State and become component parts of its property. Then it has by the Constitution the exclusive power to regulate its own internal commerce and business in such articles, and bind all residents, citizens or not, by its regulations, if they ask its protection and privileges; and Congress, instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the States can interfere in regulation of foreign commerce." (P. 625.)

In the *Passenger Cases,* 7 How., 283, the court said:

"All commercial action within the limits of a State, and which does not extend to any other State or foreign country, is exclusively under State regulation." (P. 400.)

In the *License Tax Cases,* 5 Wall., 462, the court said:

"But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade Congress has no power of regulation nor any direct control. This

power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject." (Pp. 470, 471.)

In *The Daniel Ball,* 10 Wall., 557, the court said:

"There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce 'among the several States,' with foreign nations, and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States.'" (Pp. 564, 565.)

It was held that as the boat was employed in transporting goods destined for other States she was employed as an instrument of interstate commerce and was subject to the regulation of Congress and liable to libel and fine for being operated without a United States license. Here there was a unit, the unit being the instrumentality of commerce. As it carried interstate and intrastate commerce and the two were inseparable, necessarily, the United States law prevailing, controlled the instrumentality and incidentally affected intrastate commerce. This would be no authority for contending that all employes of the Daniel Ball could be brought under congressional regulation, regardless of whether they rendered service in respect of interstate or intrastate commerce.

The co-existence of the two kinds of commerce and the relation of the power of the State to them is declared in the *State Freight Tax Case,* 15 Wall., 232, the court saying:

> "Doubtless a State may regulate its internal commerce as it pleases. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the State." (P. 277.)

In *Hall* v. *DeCuir,* 95 U. S., 485, the court said:

> "We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the States." (P. 487.)

In *Lord* v. *Steamship Co.,* 102 U. S., 541, the court said:

> "Congress has power 'to regulate commerce with foreign nations and among the several States, and with the Indian tribes' (Const., art. 1, sect. 8), but it has nothing to do with the purely internal commerce of the States, that is to say, with such commerce as is carried on between different parts of the same State, if its operations are confined exclusively to the jurisdiction and territory of that State, and do not affect other nations or States or the Indian tribes. This has never been disputed since the case of *Gibbons* v. *Ogden,* 9 Wheat., 1." (P. 543.) * * *
>
> "This disposes of the case, since, by sect. 4289 of the Revised Statutes, the provisions of sect. 4283 are not applicable to vessels used in rivers or inland navigation, and this legislation, therefore, is relieved from the objection that proved fatal to the trade mark law which was considered in *Trade-Mark Cases,* 100 U. S., 82. The commerce regulated is expressly confined to a kind

> over which Congress has been given control. There is not here, as in *Allen* v. *Newberry* (21 How., 244), a question of admiralty jurisdiction under the law of 1845, but of the power of Congress over the commerce of the United States. The contracts sued on do not relate to the purely internal commerce of a State, but impliedly, at least, connect themselves with the commerce of the world, because in their performance the laws of nations on the high seas may be involved, and the United States compelled to respond." (Pp. 544, 545.)

In *Wabash, &c., Railway Co.* v. *Illinois,* 118 U. S., 557, the court, referring to the *State Freight Tax Case,* said:

> "The case of the *State Freight Tax Case,* 15 Wall., 232, which was decided only four years before these cases, held an act of the Legislature of Pennsylvania void, as being in conflict with the commerce clause of the Constitution of the United States, which levied a tax upon all freight carried through the State by any railroad company, or into it from any other State, or out of it into any other State, and valid as to all freight the carriage of which was begun and ended within the limits of the State, because the former was a regulation of interstate commerce, and the latter was a commerce solely within the State which it has a right to regulate." (P. 570.)

In *Sands* v. *Manistee River Imp. Co.,* 123 U. S., 288, the court said:

> "The internal commerce of a State—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government." (P. 295.)

In *Covington, &c., Bridge Co.* v. *Kentucky,* 154 U. S., 204, the court said:

> "The *first* class, including all those wherein

the States have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the State, and while the regulations of the State may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference." (Pp. 209, 210.)

In *Greer* v. *Connecticut*, 161 U. S., 519, the court said:

"Passing, however, as we do, the decision of this question, and granting that the dealing in game killed within the State, under the provision in question, created internal State commerce, it does not follow that such internal commerce became necessarily the subject-matter of interstate commerce, and therefore under the control of the Constitution of the United States. The distinction between internal and external commerce and interstate commerce is marked, and has always been recognized by this court. In *Gibbons* v. *Ogden*, 9 Wheat., 1, 194, Mr. Chief Justice Marshall said:

"'It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient and is certainly unnecessary.

"'Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made, had the intention been to extend the power to every description. The enumeration presupposes some-

thing not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of the State. The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.'" * * * (Pp. 530-531.)

"The fact that internal commerce may be distinct from interstate commerce, destroys the whole theory upon which the argument of the plaintiff in error proceeds. The power of the State to control the killing of and ownership in game, being admitted, the commerce in game, which the State law permitted, was necessarily only internal commerce, since the restriction that it should not become the subject of external commerce went along with the grant and was a part of it. All ownership in game killed within the State came under this condition, which the State had the lawful authority to impose, and no contracts made in relation to such property were exempt from the law of the State consenting that such contracts be made, provided only they were confined to internal and did not extend to external commerce." (P. 532.)

In *Kidd* v. *Pearson*, 128 U. S., 1, Mr. Justice Lamar remarked:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of com-

merce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. * * * If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management. * * * The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed and incongruous legislation required by such interpretation would be about the widest possible departure from the de-

> clared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the State governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine." (Pp. 20, 21, 22.)

In *United States* v. *E. C. Knight Co.*, 156 U. S., 1, the court said:

> "Commerce succeeds to manufacture, and is not a part of it." (P. 12.)

Also:

> "It cannot be denied that the power of a State to protect the lives, health and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. The relief of the citizens of each State from the burden

of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, is subject to regulation by State legislative power. On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States, and if a law passed by a State in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme. 'Commerce, undoubtedly, is traffic,' said Chief Justice Marshall, 'but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intrecourse.' That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of

the police power of the State. *Gibbons* v. *Ogden*, 9 Wheat., 1, 189, 210; *Brown* v. *Maryland*, 12 Wheat., 419, 448; *The License Cases*, 5 How., 504, 599; *Mobile* v. *Kimball*, 102 U. S., 691; *Bowman* v. *Chicago & N. W. Railway*, 125 U. S., 465; *Leisy* v. *Hardin*, 135 U. S., 100; *In re Rahrer*, 140 U. S., 545, 555." (Pp. 11, 12.)

In *Hopkins* v. *United States*, 171 U. S., 578, the court said:

"It is not difficult to imagine agreements of the character above indicated. For example, cattle, when transported long distances by rail, require rest, food and water. To give them these accommodations it is necessary to take them from the car and put them in pens or other places for their safe reception. Would an agreement among the landowners along the line not to lease their lands for less than a certain sum be a contract within the statute as being in restraint of interstate trade or commerce? Would it be such a contract even if the lands, or some of them, were necessary for use in furnishing the cattle with suitable accommodations? Would an agreement between the dealers in corn at some station along the line of the road not to sell it below a certain price be covered by the act, because the cattle must have corn for food? Or would an agreement among the men not to perform the service of watering the cattle for less than a certain compensation come within the restriction of the statute? Suppose the railroad company which transports the cattle itself furnishes the facilities, and that its charges for transportation are enhanced because of an agreement among the landowners along the line not to lease their lands to the company for such purposes for less than a named sum, could it be successfully contended that the agreement of the landowners among themselves would be a violation of the act as being in restraint of interstate trade or commerce? Would

an agreement between builders of cattle cars not to build them under a certain price be void because the effect might be to increase the price of transportation of cattle between the States? Would an agreement among dealers in horse blankets not to sell them for less than a certain price be open to the charge of a violation of the act because horse blankets are necessary to put on horses to be sent long journeys by rail, and by reason of the agreement the expense of sending the horses from one State to another for a market might be thereby enhanced? Would an agreement among cattle drivers not to drive the cattle after their arrival at the railroad depot at their place of destination to the cattle yards where sold, for less than a minimum sum, come within the statute? Would an agreement among themselves by locomotive engineers, fireman or trainmen engaged in the service of an interstate railroad not to work for less than a certain named compensation be illegal because the cost of transporting interstate freight would be thereby enhanced? Agreements similar to these might be indefinitely suggested.

"In our opinion all these queries should be answered in the negative. The indirect effect of the agreements mentioned might be to enhance the cost of marketing the cattle, but the agreements themselves would not necessarily for that reason be in restraint of interstate trade or commerce. As their effect is either indirect or else they relate to charges for the use of facilities furnished, the agreements instanced would be valid provided the charges agreed upon were reasonable. The effect upon the commerce spoken of must be direct and proximate. *New York, Lake Erie & Western Railroad* v. *Pennsylvania,* 158 U. S., 431, 439.

"An agreement may in a variety of ways effect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because

the interference produced by the agreement or by the legislation is not direct. *Sherlock* v. *Alling*, 93 U. S., 99-103; *United States* v. *E. C. Knight Company*, 156 U. S., 1, 16; *Pittsburg & Southern Coal Co.* v. *Louisiana*, 156 U. S., 590, 597; *Transportation Company* v. *Parkersburg*, 107 U. S., 691; *Ficklen* v. *Shelby County, supra*, (145 U. S., 1). Reasonable charges for the use of a facility for the transportation of interstate commerce have heretofore been regarded as valid in this court, even though such charges might necessarily enhance the cost of doing the business. *Packet Company* v. *St. Louis*, 100 U. S., 423; *Packet Company* v. *Catlettsburg*, 105 U. S., 559; *Transportation Company* v. *Parkersburg*, 107 U. S., 691; *Huse* v. *Glover*, 119 U. S., 543; *Ouachita Packet Company* v. *Aiken*, 121 U. S., 444; *St. Louis* v. *Western Union Telegraph Company*, 148 U. S., 92. An agreement among the owners of such facilities, to charge not less than a minimum rate for their use, cannot be condemned as illegal under the act of Congress.

"The fact that the above cited cases relate to tangible property, the use of which was charged for, does not alter the reasoning upon which the decisions were placed. The charges were held valid because they related to facilities furnished in aid of the commerce and which did not constitute a regulation thereof. Facilities may consist in privileges or conveniences provided and made use of or in services rendered in aid of commerce, as well as in the use of tangible property, and so long as they are facilities and the charges not unreasonable an agreement relating to their amount is not invalid. The cattle owner has no constitutional right to the services of the commission agent to aid him in the sale of his cattle and the agent has the right to say upon what terms he will render them, and he has the equal right, so far as the act of Congress is concerned, to agree with others in his business not

to render those services unless for a certain charge. The services are no part of the commerce in the cattle." (Pp. 593, 594, 595.)

The distinction between contracts affecting manufacture and those affecting the sale of the manufactured article in interstate commerce is clearly brought out in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S., 211, as follows.

"Where the contract is for the sale of the article and for its delivery in another State, the transaction is one of interstate commerce, although the vendor may have also agreed to manufacture it in order to fulfil his contract of sale. In such case a combination of this character would be properly called a combination in restraint of interstate commerce and not one relating only to manufacture.

"It is almost needless to add that we do not hold that every private enterprise which may be carried on chiefly or in part by means of interstate shipments is therefore to be regarded as so related to interstate commerce as to come within the regulating power of Congress. Such enterprises may be of the same nature as the manufacturing of refined sugar in the *Knight case*—that is, the parties may be engaged as manufacturers of a commodity which they thereafter intend at some time to sell, and possibly to sell in another State; but such sale we have already held is an incident to and not the direct result of the manufacture, and so is not a regulation of or an illegal interference with interstate commerce." (Pp. 246, 247.) * * *

"In regard to such of these defendants as might reside and carry on business in the same State where the pipe provided for in any particular contract was to be delivered, the sale, transportation and delivery of the pipe by them under that contract would be a transaction wholly with-

in the State, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some non-resident of the State eventually obtained it.

"The fact that the proposal called for the delivery of pipe in the same State where some of the defendants resided and carried on their business would be sufficient, so far as the act of Congress is concerned, to permit those defendants to combine as they might choose, in regard to the proposed contract for the delivery of the pipe, and that right would not be affected by the fact that the contract might be subsequently awarded to some one outside the State as the lowest bidder. In brief, their right to combine in regard to a proposal for pipe deliverable in their own State could not be reached by the Federal power derived from the commerce clause in the Constitution." (Pp. 247, 248.)

In *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S., 611, the court said:

"It is said that the contract in suit, as carried out, was concerned in part with interstate commerce, and therefore was free from the operation of the Wisconsin statute. The portion of the contract that called for the carrying on of business in Wisconsin was not so concerned, and the inseparable provisions as to selling left it to chance or extrinsic business considerations whether the contemplated traffic should go outside the State or not." (P. 616.)

In *Northern Securities Company* v. *United States*, 193 U. S., 197, Mr. Justice Harlan said:

"So far as the Constitution of the United States is concerned, a State may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its

corporations to engage in commerce of every kind; domestic, interstate and international. The regulation or control of purely domestic commerce of a State is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the General Government, or any legal enactment of Congress." (P. 349.)

Also:

"Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, *so far as to compel it to respect the rules for such commerce lawfully established by Congress.*" (P. 350.)

The act interferes with the police power of the States.

While, as shown, there is an intrastate commerce which Congress cannot regulate, there is also equally removed from the control of the United States the police power of the States which affects commerce and other relations in life, some related to commerce, and others entirely dissociated from it.

The limitations of the police power have never been fully defined. The police power of the States has, however, been sufficiently defined by this court in respect of matters relating to this act, to show clearly that it falls directly within its effect, and will, if the act is constitutional, have limitations imposed upon it entirely inconsistent with the exercise of that power as hitherto recognized. As shown, the act seeks to control the relations between carriers of interstate commerce and their employes, not merely in matters that affect, but do not burden, interstate com-

merce, but in matters which can have no direct bearing upon interstate commerce. In respect of those things which cannot possibly control or burden interstate commerce, such as the law of liability between a carrier of interstate commerce and its employes, who are engaged in work in shops, with machinery, and in vocations that have nothing to do with transportation, and the regulation of which falls within the police power of the States, Congress has, under the principles of law enunciated by this court, no control. It is well settled by a long line of decisions that the State has an inherent right to exercise a police power over its railroads and their employes in matters which do not interfere with, or burden interstate commerce. The recognition of this right in the States is a denial of the right of Congress to control within the same domain. The question here is not whether the States can control matters of interstate commerce, until Congress shall have legislated upon the subject, but whether or not the subject itself is without the pale of possible congressional legislation. To hold that Congress can, under its authority to regulate interstate commerce, enter the domain where the police power of the State so operates upon persons and things as not to interfere with interstate commerce, will necessitate the overruling of a long line of decisions and a complete facing about in respect of a doctrine that has been enunciated so often as to be removed from the sphere of debate.

This court has ever been equally careful to preserve the rights and powers of the states as well as those of the national government.

For instance, the taxing power of the state, even though it incidentally and remotely affects interstate commerce, has been uniformly upheld when confined to intrastate commerce. As typical of decisions on this point, we refer to the cases of *Osborne* v. *Florida,* 164 U. S., 650; *Pullman Co.* v. *Adams,* 189 U. S., 420; *Pennsylvania* v. *Knight,* 192 U. S., 21.

The separate car legislation, enacted under the police power of the states, has been upheld when confined to intrastate commerce.

In *Louisville, &c., Railway Co.* v. *Mississippi,* 133 U. S., 587, the court said:

> "If it be a matter respecting wholly commerce within a state, and not interfering with commerce between the states, then, obviously, there is no violation of the commerce clause of the Federal Constitution." (p. 591.)

And again:

> "No question arises under this section, as to the power of the state to separate in different compartments interstate passengers, or to affect, in any manner, the privileges and rights of such passengers. All that we can consider is, whether the state has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the state is no invasion of the powers given to Congress by the commerce clause." (p. 591.)

This case was quoted and followed in *Plessy* v. *Ferguson,* 163 U. S., 537, 547.

In *C. & O. Ry. Co.* v. *Kentucky,* 179 U. S., 388, 393, the court cited both of these cases with approval. The court followed the construction of the Court of Ap-

peals of Kentucky to the effect that the act applied to domestic commerce alone and said:

> "So construing it there can be no doubt as to its constitutionality." (p. 395.)

So the police power of the state has been sustained where it operated upon articles of commerce after their interstate character had ceased.

In *Leisy* v. *Hardin*, 135 U. S., 100, Mr. Chief Justice Fuller, after reviewing the cases of *County of Mobile* v. *Kimball*, 102 U. S., 691, *Escanaba Co.* v. *Chicago*, 107 U. S., 678, *Mugler* v. *Kansas*, 123 U. S., 623, and *Eilenbecker* v. *District Court of Plymouth County*, 134 U. S., 31, 40, said:

> "These decisions rest upon the undoubted right of the states of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the National Government." (pp. 122, 123.)

In the case of *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Solan*, 169 U. S., 133, "a statute of a State, providing that no contract shall exempt any railroad corporation from the liability of a common carrier, or carrier of passengers, which would have existed if no contract had been made," was held, "as applied to a claim for an injury happening within the State under a contract for interstate transportation," not to contravene the provision of the Constitution of the United States empowering Congress to regulate interstate commerce. The court said:

> "A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable, according to the law of the State, for acts of nonfeasance or of misfeasance committed within its limits. If he

fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the State has the power to redress and punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce." (P. 137.)

The court added:

"So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits." (Pp. 137, 138.)

What phases of legislation by Congress the court had in mind are not indicated. It is made very clear, however, that they could not have contemplated any legislation affecting the statute in respect of the particular matter then before the court, for the conclusion of the case was as follows:

"The statute now in question, so far as it concerns liability for injuries happening within the State of Iowa—which is the only matter presented for decision in this case—clearly comes within the

same principles. It is in no just sense a regulation of commerce." (P. 138.)

If fixing the liability as between a common carrier engaged in interstate commerce and one of its passengers traveling within the State, was "in no just sense a regulation of commerce," then *a fortiori* fixing the liability of a common carrier engaged in interstate commerce to its employes having nothing to do with interstate commerce, would still less be such a regulation of commerce as would empower the general government to interfere with the police power of the State.

In *Smith* v. *Alabama,* 124 U. S., 465, the court in holding that an Alabama statute requiring locomotive engineers in that State to be examined and licensed by a board to be appointed for that purpose, was valid, decided only that, in so far as interstate commerce was concerned, Congress not having legislated on the subject, such regulations were in aid of rather than a burden upon interstate commerce. It was said that Congress would have had a right to legislate upon that subject, but this was said only in respect of interstate commerce, and this case can be no authority for the contention that because it was asserted that Congress could in the particular matter legislate in respect of interstate commerce, it could also regulate the carrier in its strictly intrastate commerce activities, and in those matters having no direct relation to commerce.

The same principle was decided in *Western Union Telegraph Company* v. *James,* 162 U. S., 650.

In *Nashville, &c., Railway* v. *Alabama,* 128 U. S.,

96, the court, referring to the case of *Smith* v. *Alabama,* said:

> "And the court in that case held that the provisions in the statute of Alabama were not strictly regulations of interstate commerce, but parts of that body of the local law which governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with an express enactment of Congress in the exercise of its power over commerce, and that until so displaced they remain as the law governing carriers in the discharge of their obligations, whether engaged in purely internal commerce of the State, or in commerce among the States." (Pp. 100, 101.)

The manifest meaning of this is that the body of local laws which governs the relations between carriers of passengers and merchandise and the public who employ them is not displaced until it and so far as it comes in conflict with an express enactment of Congress in the exercise of its power over commerce. This enactment must be within the constitutional powers of Congress. If the body of local law does not directly affect or burden interstate commerce, then it could not come in conflict with a constitutional enactment of Congress. So long as it does not affect interstate commerce, there can never be such a real conflict, and if an apparent conflict arises in respect of such local laws it is not because they interfere with interstate commerce, but because Congress has exceeded its constitutional limitations. There can only be conflict under two conditions,—one that the local laws regulate or burden interstate commerce, and the other that the congressional enactment regulates

matters that not only are not interstate commerce, but do not in any way burden or restrict it.

In *Pennsylvania Rialroad Co.* v. *Hughes*, 191 U. S., 477, the court said:

> "In *M. K. & T. Ry.* v. *Haber*, 169 U. S., 613, 635, after reviewing previous cases in this court, Mr. Justice Harlan, delivering the opinion of the court, says:
>
> " 'These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a State, belong primarily to such State under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the State upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress, must be respected until Congress intervenes.' " (p. 489.)

In *Covington, &c., Bridge Company* v. *Kentucky*, 154 U. S., 204, Mr. Justice Brown said:

> "The adjudications of this court with respect to the power of the States over the general subject of commerce are divisible into three classes. First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the States cannot interfere at all.
>
> "The *first* class, including all those wherein the States have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the State, and while the regulations of the State may affect interstate commerce indirectly, their bearing upon it is so remote that

it cannot be termed in any just sense an interference. Under this power, the States may authorize the construction of highways, turnpikes, railways, and canals between points in the same State, and regulate the tolls for the use of the same. *Railroad* v. *Maryland,* 21 Wall., 456; and may authorize the building of bridges over non-navigable streams, and otherwise regulate the navigation of the strictly internal waters of the State—such as do not, by themselves or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other States or foreign countries. *Veazie* v. *Moor,* 14 How., 568; *The Montello,* 11 Wall., 411; s. c., 20 Wall., 430. This is true notwithstanding the fact that the goods or passengers carried or traveling over such highway between points in the same State may ultimately be destined for other States, and, to a slight extent, the state regulations may be said to interfere with interstate commerce." (Pp. 209, 210.)

In *United States* v. *E. C. Knight Co.,* 156 U. S., 1, the court said:

"It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

"It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international com-

merce may be ultimately affected. *The regulation of commerce applies to the subjects of commerce and not to matters of internal police.* Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is *because they form part of interstate trade or commerce.*" (p. 13.)

In *Louisville & Nashville Railroad Co.* v. *Kentucky*, 161 U. S., 677, where the power of the State of Kentucky to inhibit the consolidation of two railroads created by it was questioned on the ground that it was an interference with commerce between the States, the court said:

"It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.

"If it be assumed that the States have no right to forbid the consolidation of competing lines,

> because the whole subject is within the control of Congress, it would necessarily follow that Congress would have the power to authorize such consolidation in defiance of state legislation—a proposition which only needs to be stated to demonstrate its unsoundness." (P. 702.)

If Congress can under the claim of regulating interstate commerce fix the liability between their employers and interstate carriers on account of their relations to an instrumentality of commerce *a fortiori* it could force the consolidation of ownership of such instrumentalities.

In *Western Union Telegraph Company* v. *James,* 162 U. S., 650, the court, referring to the case of *Hall* v. *DeCuir,* 95 U. S., 485, 489, said:

> "It is seen from this reasoning that the foundation for holding the act void was that it necessarily affected the conduct of the carrier and regulated him in the performance of his duties outside and beyond the limits of the State enacting the law." (P. 658.)

In *Gladson* v. *Minnesota,* 166 U. S., 427, a statute of the State requiring every railroad corporation to stop all regular passenger trains running wholly within the State, at all county seats, was held to be a reasonable exercise of the police power of the State, and not to interfere with interstate commerce. The court said:

> "A railroad corporation created by a State is for all purposes of local government a domestic corporation, and its railroad within the State is a matter of domestic concern. Even when its road connects, as most railroads do, with railroads in other States, the State which created the corporation may make all needful regulations of a police character for the government of the com-

pany while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the State. They are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States." (P. 430.)

The first condition is that they must operate so as to regulate interstate commerce.

In *Cleveland, &c., Railway Co.* v. *Illinois,* 177 U. S., 514, the court, after referring to this case, said:

> "The railroad in this case was treated as a purely domestic corporation, notwithstanding it connected, as most railroads do, with railroads in other States." (P. 519.)

In *Lake Shore & Michigan Southern Railway Company* v. *Ohio,* 173 U. S., 285, where a statute of Ohio provided that every railroad company should cause three of its regular trains carrying passengers, if so many were run daily, Sundays excepted, to stop at a station, city or village containing over three thousand inhabitants, was sustained, this court said:

> "Certainly, the State of Ohio did not endow the plaintiff in error with the rights of a corporation for the purpose simply of subserving the convenience of passengers traveling through the State

between points outside of its territory." (P. 301.) * * *

"It was for the State to take into consideration all the circumstances affecting passenger travel within its limits, and as far as practicable make such regulations as were just to all who might pass over the road in question. It was entitled of course to provide for the convenience of persons desiring to travel from one point to another in the State on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the State to places beyond its limits, or the convenience of those outside of the State who wished to come into it." (p. 302.) * * *

"And the State of Ohio by the statute in question has done nothing more than to so regulate the use of a public highway established and maintained under its authority as will reasonably promote the public convenience. It has not unreasonably obstructed the freedom of commerce among the states. Its regulations apply equally to domestic and interstate railroads. Its statute is not directed against interstate commerce, but only incidentally affects it." (p. 303.)

In *Lake Shore, &c., Ry. Co.* v. *Smith,* 173 U. S., 684, the court said:

"The police power is a general term used to express the particular right of a government which is inherent in every sovereignty. As stated by Mr. Chief Justice Taney, in the course of his opinion in the *License cases,* 5 How., 504, 583, in describing the powers of a State: 'They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it ex-

> ercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion.'" (P. 689.)

This case was distinguished in *Cleveland, &c., Railway* v. *Illinois*, 177 U. S., 514, 520, in that the Illinois statute, which was not sustained, necessarily interfered with interstate commerce.

In the *Lake Shore Case*, and the *Cleveland Case*, and subsequently in the case of *Mississippi Railroad Commission* v. *Illinois Central Railroad Company*, the court said:

> "Railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise but who may have contributed largely to the construction of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic." (177 U. S., 521, 522.)

In *Northern Securities Company* v. *United States*, 193 U. S., 197, the Chief Justice and Justices White, Peckham and Holmes said:

> "In *Louisville & Nashville Railroad Company* v. *Kentucky*, 161 U. S., 677, the power of the State to pass a law forbidding the consolidation of competing state railroad corporations doing in part an interstate commerce business was again considered, and a state statute in which the power was exercised was upheld. Here, again, it is to be observed that if the consolidation of state railroad corporations, because they did in part an interstate commerce business, was within the paramount authority of Congress, that authority was exclusive and the state regulation which the court upheld was void. And this question, vital to the

consideration of the case, and without passing upon which it could not have been decided did not escape observation, since it was explicitly pressed upon the court and was directly determined. The court, speaking through Mr. Justice Brown, said (pp. 701, 702):

"'But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways. * * *

"'It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.'" (Pp. 382, 383.)

In *B. & O. Railroad Company* v. *Baugh,* 149 U. S., 368, the only question before the court was whether an engineer and fireman of a locomotive engine were fellow-servants. It was held that the general principles of the commercial law would be applied by the Fed-

eral courts, regardless of the decisions of the state courts. In the opinion, Mr. Justice Brewer, in discussing the general question of the power of the states to legislate and change the rules of common law and the rules to be applied in the absence of such legislation, said:

> "Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the states is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution. * * *
>
> The lines of this very plaintiff in error extend into half a dozen or more states and its trains are largely employed in interstate commerce. As it passes from state to state, must the rights, obligations and duties subsisting between it and its employes change at every state line?"

He expressly assumed the power of the states to legislate in respect of this matter, and was only considering the general principles of commercial law. The court did not have under consideration a Federal statute superseding the power of the state to legislate in respect of those employes engaged in carrying on interstate commerce, and far less one which would supersede such power in respect of employes of common carriers having no connection whatever with interstate transportation.

The act proposes not merely to give a right of action for injury to employes, but determines who the beneficiaries shall be.

The first section says the right of action shall survive, "in the case of his death, to his personal representative, for the benefit of his widow and children, if

any, if none, then for his parents, if none, then for his next of kin dependent upon him." If all of these classes fail there can be no recovery. If the first two fail, there can be none unless there are kin who were dependent upon him. The recovery is limited to the damages sustained. Nothing can be allowed for mental and physical suffering.

This action was brought in Tennessee for an injury sustained in Tennessee.

Under the Tennessee law, the right of action passes to the widow and, in case there is no widow, to the children or to the personal representatives for the benefit of the widow or next of kin.

Freeman v. *Railroad,* 107 Tenn., 340, 344.

The widow can sue in her own right.

She may control the suit regardless of the children or the personal representative.

5 Lea, 418.
10 Lea, 451.
8 Pickle, 141.

This action was originally brought by her, but was amended so as to have her sue as administratrix, in conformity with the requirement of the Employers' Liability Act. The personal representative could recover under the law of Tennessee regardless of whether the next of kin were dependent on the deceased. The amount of recovery would not be limited to the damages sustained by any of the classes named, but would be such an amount as the deceased could have recovered if he had lived, and the jury must allow for his mental and physical suffering, loss of

time and necessary expenses, and also the damages resulting to the parties for whose benefit the action survives.

Shannon's Code of Tenn., Sec. 4029.

This may be augmented by punitive damages.

Same Code, p. 989, Sec. 51.

Thus the law of Tennessee in respect of distribution of money which can have no possible bearing upon interstate commerce is to be entirely supplanted by a congressional provision under the pretext of regulating commerce between the States. If the act be valid the same will obtain in case of a suit brought for the death of a day laborer digging a ditch on the carrier's shop premises, and thus the act will not only regulate the rights of an employe having nothing whatever to do with interstate commerce, but in respect of a matter having no connection with interstate commerce. The employes of interstate carriers in Tennessee will have limitations put upon their right of recovery that will not apply to employes doing similar work for all engaged in interstate trade and commerce other than common carriers.

What has been said with respect to the law of Tennessee, is with variations applicable to all of the States. The provisions of the act conflict more or less with all of them.

It is submitted upon the authorities cited under other headings, that Congress has no power to regulate the measure of damages or who the beneficiaries shall be, and that this comes strictly within the reserved power of the States.

Admiralty and Maritime Jurisdiction.

In the argument in the Circuit Court, reference was made by counsel for the Government to certain admiralty cases, which had been decided by this court, and inferior federal courts, wherein there was under consideration acts of Congress regulating liability of ship owners. The fact that such acts are constitutional, when applied to cases falling within the admiralty and maritime jurisdiction is no argument that similar acts would be constitutional when applied to carriers by land. It is true that the admiralty and maritime jurisdiction and the power to regulate commerce with foreign nations cover, to some extent, the same field, but they are not coterminous. The Constitution of the United States, Section 2, Article 3, provides as follows:

> "The judicial power shall extend to all cases of admiralty and maritime jurisdiction."

Because powers, rights, and liabilities may be defined and enforced under the maritime and admiralty jurisdiction of the United States, it does not follow that similar powers, rights and liabilities can be defined or enforced as to inter-state carriers by land. The character of commerce by water and that by land, are essentially different, as has been repeatedly pointed out by this court. As was said in the case of the Daniel Ball, 10 Wallace, 557:

> "It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a state,—that Congress may take the entire control of the commerce of the country and extend its regulations to the railroads within a state on which grain or fruit is transported to a

distant market. We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation." (p. 565.)

And again in the case of *B. & O. R'd Co.* v. *Maryland,* 21 Wallace, 456, the Supreme Court said:

"Commerce on land between the different states is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the state and federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again,—the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land." (p. 470.)

As illustrating the extent to which this maritime jurisdiction extends, and as further illustrating the more extensive jurisdiction of the United States in maritime cases than in cases arising on land, we call attention to the case of *Ex Parte Garnett,* 141 U. S., 1. In that case there arose the question of liability of

the owner of a steamboat, (for cotton destroyed by fire), which navigated the Savannah River between Savannah, Ga., and Augusta, Ga. The court held that the question of liability depended upon the maritime law, inasmuch as the Savannah River was a navigable stream, saying:

> "It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations and among the several states in order to find authority to pass the law in question. The act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is co-extensive with that law. It is not confined to the boundaries of class of subjects which limit and characterize the power to regulate commerce, but in maritime matters it extends to all matters and places to which the maritime law extends. The subject has frequently been up for consideration by this court for many years past, and but one view has been expressed." (p. 12.)

The court then cited *Butler* v. *Steamship Co.*, 130 U. S., 527. wherein there was involved the liability of a steamship for loss of life which occurred through the stranding of the steamer in Martha's Vineyard Sound, which was within the technical limits of a county of the State of Massachusetts, quoting as follows:

> " 'The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is co-extensive, in its operation, with the whole territorial domain of that law.' " (p. 12.)

In the case of *Patterson* v. *The Bark Eudora*, 190

U. S., 169, it appeared that an act had been passed by Congress making it a misdemeanor to pay the wages of any seaman in advance, and further providing that, if such advance payment should be made it would not absolve the vessel, or its master or owner, from the payment of wages contracted for. The advance payment could not be pleaded as a set-off. The court drew attention to the distinction between the right of Congress to legislate in regard to commerce by water and commerce by land and held, that contracts for seamen's wages are exceptional in character and may be subjected to special restrictions; that when they relate to commerce *not wholly within a State*, legislation enforcing such restrictions comes within the domain of Congress under the Commerce clause of the Constitution. The case arose in respect of a seaman shipped from an American port to a foreign port. The right to protect sailors by exceptional means was predicated upon the right exercised from earliest historical periods to force them by exceptional means to perform their contracts (p. 175).

The court said:

> "Neither do we think there is in it any trespass on the rights of the states. No question is before us as to the applicability of the statute to contracts of sailors for services wholly within the state. We need not determine whether one who contracts to serve on a steamboat between New York and Albany, or between any two places within the limits of a state, can avail himself of the privileges of this legislation, for the services contracted for in this case were to be performed beyond the limits of any single state, and in an ocean voyage. Contracts with sailors

> for their service are, as we have seen, exceptional in their character, and may be subjected to special restriction for the purpose of securing the full and safe carrying on of commerce on the water. Being so subject, whenever the contract is for employment in commerce, not wholly within the state, legislation enforcing such restrictions comes within the domain of Congress, which is charged with the duty of protecting foreign and interstate commerce." (Pp. 175, 176.)

If the rule laid down in this case as to sailors is based on the commerce clause, and if the rights and obligations of all employes of common carriers engaged in interstate commerce are to be correlated to the same rule, then the disabilities imposed on sailors can under the same power be put on such employes, and the states can give them no protection. Congress can extend Secs. 4598 and 4599, Rev. Stat., to all employes of those engaged in interstate trade and commerce, and make them surrender their personal liberty during the life of their contracts. Would any one be willing to press the authority claimed for the *Eudora case* to its logical conclusion? That is a just test of the soundness of the contention.

In the case of *The Lottawana*, 21 Wall., 558, there were several libels filed against the steamer Lottawana, and in the course of the opinion the court used some general expressions in regard to the scope of the maritime law and of regulations under the commerce clause of the Constitution. These general expressions were cited by counsel for the Government as authority for the constitutionality of the Employers' Liability Act. However, independently of the fact that the excerpts relied on were

general expressions, it is to be noted that the court in discussing whether, under the commerce clause of the Constitution, Congress would have power to declare a lien, in favor of those furnishing supplies to steamships, said:

> "Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law, and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrolment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime. And with regard to the question now under consideration, namely the rights of material-men in reference to supplies and repairs furnished to a vessel in her home port, there does not seem to be any great reason to doubt that Congress might adopt a uniform rule for the whole country, though, of course, this will be a matter for consideration should the question ever be directly presented for adjudication." (p. 577.)

The above decisions, however extensively they may recognize the power of Congress to define liability of those engaged in transportation by water under the admiralty and maritime jurisdiction of the United States, have no application to the power of Congress to regulate commerce by land, nor the liabilities of those engaged in commerce by land. While statutes governing commerce by water may fall under both the commerce clause of the Constitu-

tion and the admiralty and maritime jurisdiction of the Government, yet the difference between commerce by water and commerce by land should not be overlooked, and the power of the Government as to the former confused with its power as to the latter.

Inseparable as to unconstitutional parts, and therefore entirely unconstitutional.

When a provision of an act of Congress in assuming to regulate commerce, covers intrastate as well as interstate commerce, the action of Congress on the two classes of commerce being inseparable, must fail *in toto*. Here there can be no question of rejecting certain words, or any separate section, or part of the act, applicable to intrastate and not to interstate commerce. If all that embraces intrastate commerce be eliminated, nothing will be left to operate upon interstate commerce. The decisions of this court turn upon whether or not the unconstitutional part is separable and clearly establish that where a statute is couched in terms so broad as to exceed the limits of the power of the legislature to enact it, the court will not by construction limit the statute to the scope which might constitutionally be given it by the legislature, but will hold it unconstitutional.

In *United States* v. *Reese et al.*, 92 U. S., 214, 221 (1875), the question presented was whether the statute providing punishment of election inspectors refusing to count the votes of citizens because of their race, color or previous condition of servitude could be made effective. The court said that the *Fifteenth Amendment* did not clothe Congress with power to penalize every wrongful refusal to receive the vote of a qualified

elector at state elections, but such authority was restricted to the rejection of such vote because of race, color or previous condition of servitude. Finding that the statute exceeded the authority of Congress the court said (p. 220):

> "It remains now to consider whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, etc.
>
> There is no attempt in the sections now under consideration, to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the Constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its Constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the states and the people.

To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

In *United States* v. *Steffens*, 100 U. S., 82, there was under consideration the Constitutionality of the trade-mark legislation of Congress. This legislation on its face was not confined to trade marks on goods or packages, which were interstate commerce, but applied to trade marks on all packages, whether such packages might be intrastate commerce or interstate commerce. The argument was made in that case that the court should hold the statute constitutional, if possible, and if it was necessary the court should confine the meaning of the act exclusively to trade marks on interstate commerce. This view the court declined to take, for the reason that the act, like the one under consideration, was plain on its face, and applied to all trade marks alike, and refused to make a law which it was not certain that congress ever intended to enact.

Said the court:

"Governed by this view of our duty, we proceed to remark that a glance at the commerce clause of the Constitution discloses at once what has been often the subject of comment in this court and out of it, that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the states, and commerce with the Indian tribes. While bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the states means commerce between the individual citizens of different states, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same state, is beyond the control of Congress. (p. 96.)

When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same state, it is obviously the exercise of a power not confided to Congress. (pp. 96, 97.)

It is therefore manifest that no such distinction is found in the act, but that its broad purpose was to establish a universal system of trade-mark registration, for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without regard to the character of the trade to which it was to be applied or the residence of the owner, with the solitary exception that those

who resided in foreign countries which extended no such privileges to us were excluded from them here.

It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several states, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body." (p. 98.)

In commenting on and quoting from the Reese case, in the Trade-Mark cases, *supra*, the court said:

"It was urged, however, that the more general description of the offense included the more limited one, and that the section was valid where such was in fact the cause of denial. But the court said, through the chief justice: 'We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The ques-

tion, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. * * * To limit this statute in the manner now asked for would be to make a new law, not to enforce the old one. This is no part of our duty.' If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law. Cooley, Const. Lim., 178, 179; *Com.* v. *Hitchins*, 5 Gray, 482." (pp. 98-99.)

In *United States* v. *Ju Toy*, 198 U. S., 253, the court said:

"It also is established by the former case (*United States* v. *Sing Tuck*, 194 U. S., 161), and others which it cites that the relevant portion of the act of August 18, 1894, C. 301, is not void as a whole. The statute has been upheld and enforced. *But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains.* That has been decided over and over again. *United States* v. *Reese*, 92 U. S., 214, 221; *Trade-Mark Cases*, 100 U. S., 82, 98, 99; *Allen* v. *Louisiana*, 103 U. S., 80, 84; *United States* v. *Harris*, 106 U. S., 629, 641, 642; *Virginia Coupon Cases*, 114 U. S., 269, 305; *Baldwin* v. *Franks*, 120 U. S., 678, 685-689; *Smiley* v. *Kansas*, 196 U. S., 447, 455. It necessarily follows that when such words are sustained they are sustained to their full extent." (pp. 262, 263.)

The doctrine for which we are now contending was stated most clearly and conclusively in the case of *Illinois Central Railroad Co.* v. *McKendree et al.*, 27 Supreme Court Reporter, page 153.

In that case the Supreme Court, was among other things asked to pass upon the validity of an order of the secretary of agriculture, made pursuant to an act of Congress of February 2, 1903, the effect of which was to ratify and adopt for the United States a quarantine line formerly adopted by the State of Tennessee, running from east to west through the State of Tennessee, the same not following the state line between the State of Tennessee and any other states. This order prohibited the carrying of cattle from south of the line to the north of it, and, in effect, prohibited the carrying of cattle from any place in Tennessee south of the line to any place in Tennessee north of it.

The contention of the defendant was that the statute was unconstitutional, and that therefore the order was a nullity, because it embraced in its terms intrastate as well as interstate commerce.

It was insisted by the government that it was not the intention of the secretary to make the provision applicable to intrastate commerce, as the recital of the order showed an intention to adopt the state lines. In disposing of this contention the Supreme Court said:

> "The terms of Order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. It would, therefore, include cattle transported within the State of Tennessee from the south of the line as well as those from outside that state. There is no excep-

tion to the order, and in terms it includes all cattle transported from the south of the line, whether within or without the State of Tennessee. It is urged by the Government that it was not the intention of the Secretary to make provisions for intrastate commerce, as the recital of the order shows an intention to adopt the state line when the state, by its legislature, has passed the necessary laws to enforce the same completely and strictly. But the order in terms applies alike to interstate and intrastate commerce. A party prosecuted for violating this order would be within its term, if the cattle were brought from the south of the line to a point north of the line within its term, if the cattle were brought from the south of the line to a point north of the line within the State of Tennessee. It is true, the Secretary recites that legislation has been passed by the State of Tennessee to enforce the quarantine line, but he does not limit the order to interstate commerce coming from south of the line; and, as we have said, the order in terms covers it. We do not say that the state line might not be adopted in a proper case, in the exercises of Federal authority, if limited in its effect to interstate commerce coming from below the line, but that is not the present order, and we must deal with it as we find it.

Nor, have we the power to so limit the Secretary's order as to have it apply only to interstate commerce, which, it is urged, is all that is there involved. For aught that appears upon the face of the order, the Secretary intends to apply to all commerce, and whether he would have made such an order if strictly limited to interstate commerce we have no means of knowing.

The order is in terms single and indivisible."

Citing:

U. S. v. *Reese*, 92 U. S., 214-21.

Trade Mark Cases, 100 U. S., 82, 89.

U. S. v. *Ju Toy*, 198 U. S., 253, 262, 263.

The same principle is announced in *Baldwin* v. *Franks*, 120 U. S., 678, 686. The doctrine of this court is very elaborately discussed and followed in a very recent decision of the Supreme Court of Mississippi.

Ballard v. *Cotton Oil Co.*, 81 Miss., 507.

The principle is not different whether the case be civil or criminal.

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 565 (1902), the court declared void the Illinois statute denouncing trusts except those effected by farmers, and held that the exception could not be rejected in order to render the statute valid, saying:

> "If the latter section be eliminated as unconstitutional, then the Act, if it stands, will apply to agriculturalists or live stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill, or acts in respect of their products or stock in hand, etc." (p. 565.)

His Honor, Judge Trieber, in his opinion in *Spain* v. *St. Louis & San Francisco Railroad Company*, recently rendered, holding this act constitutional, bases his decision upon the point in question, largely upon the idea that this court, in deciding the acts unconstitutional which were severally involved in *United States* v. *Reese*, the *Trade-Mark Cases*, *United States* v. *Harris*, and *Baldwin* v. *Franks*, was controlled by the consideration that they were penal. While in the opinions some emphasis is laid upon this fact, the reasoning is equally applicable to acts that are not penal.

Judge Trieber assumed, upon the authority of *Johnson* v. *Southern Pacific Company,* 196 U. S., 1, that the act under consideration is not penal. The court did not decide that the Act of March 2, 1893, was not penal. It said:

> "This strictness was thought to be required because the common law rule as to the assumption of risk was changed by the act, and because the act was penal.
>
> The dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law, and as there is no doubt of that intention here, the extent of the application of the change demands at least no more rigorous construction than would be applied to penal laws. * * *
>
> The primary object of the act was to promote the public welfare by securing the safety of employes and travelers, and it was in that aspect remedial, while for violations a penalty of one hundred dollars, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness of construction." (p. 17.)

In the act in question there is no provision whatever for the security of employes. There is no regulation as to the character of instrumentalities to be used. It gives them indemnity but not security. Its effect will be more likely to encourage than diminish negligence. It provides alone for damages for negligence. It is in its nature penal and has no other quality. But there can be no sound reason for hold-

ing that an act is unconstitutional if it subjects to fine and imprisonment, but constitutional if it only takes property *in invitum*. The fundamental question in both cases is whether or not the act is the law of the land.

The rule is stated in *Northern Securities Company* v. *United States*, 193 U. S., 197, by Mr. Justice Harlan, who said:

> "It is said that this statute contains criminal provisions and must therefore be strictly construed. The rule upon that subject is a very ancient and salutary one. It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical or forced construction of words, exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the legislature, and the duty of the court is to give effect to that intention as disclosed by the words used." (p. 358.)

The doctrine laid down in the cases above referred to has been declared just as forcibly where the liability was purely civil and no penal feature was involved in the act.

In *Allen* v. *Louisiana*, 103 U. S., 80, the court said:

> "It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. 'But,' as was said by Chief Justice Shaw, in *Warren* v. *Mayor and Alderman of Charlestown* (2 Gray (Mass.), 84), 'if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as

> a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.' The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature." (pp. 83, 84.)

In *Spraigue* v. *Thompson*, 118 U. S., 90, 94 (1885), a Georgia pilot sued the owners of the steamer Saxon for pilotage claimed under state laws, and obtained judgment in the state court. Upon writ of error from this court the state law was held invalid as inconsistent with Federal laws covering the same subject. The state court had held the statute valid in part and invalid as to the residue. The court said:

> "It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute which is unconstitutional, may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of the exceptions. We are, therefore, constrained to hold that the provisions of section 1512 of the Code of Georgia cannot be separated so as to reject the unconsti-

tutional exceptions merely, and that the whole section must be treated as annulled and abrogated by section 4237 of the Revised Statutes."

This court, accordingly, concluded that the "Saxon" was not liable for pilotage under the Georgia statute.

In *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S., 601, the court said:

"It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven to thirty-seven, inclusive, which relate to the subject which has been under discussion; and as to them we think the rule laid down by Chief Justice Shaw in *Warren* v. *Charlestown*, 2 Gray, 84, is applicable, that if the different parts 'are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.' Or, as the point is put by Mr. Justice Matthews in *Poindexter* v. *Greenhow*, 114 U. S., 270, 304: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part

should fail. To hold otherwise would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact.' And again, as stated by the same eminent judge in *Spraigue* v. *Thompson*, 118 U. S., 90, 95, where it was urged that certain illegal exceptions in a section of a statute might be disregarded, but that the rest could stand: 'The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions.'" (pp. 635, 636.)

And again:

"Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, we are constrained to conclude that sections twenty-seven to thirty-seven, inclusive, of the act, which became a law without the signature of the president on August 28, 1894, are wholly inoperative and void." (p. 637.)

From the language of this court above quoted it appears that an Act of Congress covering legitimate as well as illegitimate fields of legislation in a single provision cannot be rendered effective by holding it invalid as to the field wherein Congress had no power to legislate. To reject the legislation so far as it is invalid and enforce the remainder would amount to substituting legislation by the court for that by Congress.

III.

THE ACT IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The first section makes every *common carrier engaged in interstate commerce* liable to its employes for the neglect of their fellow-servants and for any defect or insufficiency due to the carrier's negligence in the instrumentalities used in the business, and this without regard to the employes' continuing in the service with knowledge of such defect or insufficiency.

The second section provides that in all actions brought against such carriers for personal injuries to an employe contributory negligence shall not bar recovery where it was slight, and that damages shall be only diminished on account of such negligence.

The third section provides:

> "That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employe, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employe: *Provided, however*, That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employe, or, in case of his death, to his personal representative."

The Fifth Amendment provides in part as follows:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

This amendment is a limitation upon the power of Congress. The Fourteenth Amendment, which is a limitation upon the power of the states, provides:

> "Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Arbitrary and capricious classification, by which a class of persons is subject to unusual burdens, is obnoxious to either amendment. If it be a state statute, it is obnoxious to the Fourteenth Amendment; if a Federal statute, it is obnoxious to the Fifth Amendment.

Both amendments protect corporations, as well as natural persons, from being deprived of property without due process of law, and, therefore, protect against arbitary classification. *County of San Mateo* v. *Southern Pacific Railroad*, 13 Fed. Rep., 145, 150 (Judge Field).

Under the Fourteenth Amendment, this court has had occasion to pass upon classifications made by the legislatures of several states, and now under the Fifth Amendment, it is asked to pass upon a classification made by Congress.

Our contention is that the act violates the Fifth Amendment because:

(1) It subjects common carriers, engaged in inter-

state commerce to different and greater liabilities than others engaged in interstate commerce.

(2) It takes away from common carriers defenses available to others engaged in interstate commerce.

(3) It limits the powers of contract of common carriers, when others engaged in interstate commerce are not so limited in their contracts with their employes.

(4) It subjects employes of such common carriers to a disability in contracting which does not attach to employes of others engaged in interstate commerce, who render a like service under similar conditions.

Even in depotic France, Turgot when he abolished the tyranny of the guilds put in the mouth of Louis XVI these words:

> "God, when He made man with wants, and rendered labor an indispensable resource, made the right of work the property of every individual in the world, and this property is the first, the most sacred and the most inprescriptible of all kinds of property. We regard it as one of our first duties, an act worthy of all benevolence, to free our subjects from every infraction of that inalienable right of humanity."

The right to contract is as well recognized as the right to property and the courts protect it against unlawful restriction.

In *Allgeyer* v. *Louisiana*, 165 U. S., 578, the Supreme Court said:

> "The liberty mentioned in that amendment (the fourteenth) means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be

> free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." (p. 589.)

In *Lochner* v. *New York,* 198 U. S., 45, in holding a statute of New York limiting the hours of employment in bakeries unconstitutional, the court said:

> "Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employes, if the hours of labor are not curtailed. If this be not clearly the case the individuals, whose rights are thus made the subject of legislative interference, are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the State has no power to limit their right as proposed in this statute." (P. 61.)

Acts have been passed in four States of the Union to prohibit employers from discharging or threatening with discharge their employes, or interfering with or discriminating against them, because they belong to unions, and in each of these States the court of last resort has held such act invalid as interfering with the

right of contract as included within the words "liberty and property."

In *State* v. *Julow,* 129 Mo., 163, the court in passing on such a statute of Missouri, referring to various provisions of the State Constitution and to the Fifth Amendment to the Federal Constitution, said:

> "In Section 30, *supra,* as well as in the section of the Federal Constitution just recited, it will be noted that the rights of life, liberty, and property are grouped together in the same sentence; they constitute a trinity of rights, and each. as opposed to unlawful deprivation thereof, is of equal constitutional importance."

As to whether this language embraced the freedom of contract, the court said:

> "Take, for instance, that of property. Necessarily blended with that right are those of acquiring property by labor, by contract, and also of terminating that contract at pleasure, being liable, however, civilly for any unwarranted termination."

In *Gillespie* v. *People,* 188 Ill., 176, a similar statute of Illinois was held unconstitutional.

In *State* v. *Kreutzberg,* 114 Wis., 530, a similar statute of Wisconsin was held invalid, and in New York such a statute was held unconstitutional in *People* v. *Marcus,* 185 N. Y., 257.

In *State* v. *Kreutzberg, supra,* the court said:

> "Free will in making private contracts, and even in greater degree in refusing to make them, is one of the most important and sacred of the individual rights intended to be protected." (p. 540.)

See, also,

Wallace v. *Georgia, etc., Ry. Co.,* 22 S. E., 579.

Brewster v. *Miller's Sons Co.*, 101 Ky., 368.
Hundley v. *L. & N. R. Co.*, 105 Ky., 162.
State v. *Bateman*, 7 Ohio N. P. R., 478.

In *Railroad Company* v. *Richmond*, 19 Wall., 584, the court said:

> "The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation; it was never intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse." (pp. 589, 590.)

It is not contended that the right of contract extends to an interference with or a regulation of interstate commerce and in violation of an act of Congress lawfully covering that subject, for the contrary was decided in *Addyston Pipe & Steel Company* v. *United States*, 175 U. S., 211, but it is contended that Congress cannot, under the guise of regulating interstate commerce, legislate upon the right of contract in relation to matters only indirectly connected with interstate commerce, and for this proposition, the *reasoning* of that case is likewise an authority.

Classification.

The burdens cast upon carriers by the act are cast upon all common carriers engaged in interstate commerce without distinction or discrimination. There are many classes of common carriers, as by rail, by

water, by telephone, by telegraph, by pipe line, by wagon and otherwise.

If the act were confined to common carriers by rail, the classification would be arbitrary, because it abolishes the fellow-servants rule as to all of their employes without regard to the character of service. Some of the servants of carriers by rail are engaged in hazardous occupations and others in occupations not at all hazardous. There are not the same reasons for the abolition of the fellow-servants rule as to clerks in the auditor's office as there are for its abolition as applied to train operatives.

By due process of law, is meant that if a particular class is to be given particular benefits or subjected to particular burdens or disabilities, there should be some good reason for such classification.

As was said by the Supreme Court of Tennessee in *Stratton* v. *Morris,* 89 Tenn., 497, 534, after an elaborate review of the authorities:

> "We conclude, upon a review of the cases referred to above, that whether a statute be public or private, general or special in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural and not arbitrary.
>
> "If the classification is made under Article XI, Sec. 8, of the Constitution for the purpose of conferring upon a class the benefit of some special right, privilege, immunity, or exemption, there must be some good and valid reason why that particular class should alone be the recipient of the benefit.
>
> "If the classification is made under Article I, Section 8, of the Constitution for the purpose of

> subjecting a class to the burden of some special disability, duty, or obligation, there must be some good and valid reason why the particular class should alone be subjected to the burden." (pp. 534, 535.)

This case is quoted with approval by Mr. Justice Brewer in *Gulf, Colorado & Santa Fe Railroad Company* v. *Ellis*, 165 U. S., 150, 156.

An examination of the act under consideration will show that there is no natural basis for the classification which has been made, but the basis will be found to be purely arbitrary and capricious.

In order for a classification to be constitutional, it is not only necessary that all persons brought under its influence are treated alike under the same conditions, but it must bring within its influence all who are under the same conditions, and not bring within its influence those who are under different conditions. Assuming that there is a substantial reason for abolishing the fellow-servant doctrine as to those engaged in the hazardous work of operating railway trains, does the same reason exist for abolishing the fellow-servant doctrine as to street car companies, telephone and telegraph companies, pipe line companies and stage coach companies, engaged in interstate commerce, or as to railroad employes who perform purely clerical or other non-hazardous services?

In the case of *Missouri Pacific Railroad* v. *Mackey*, 127 U. S., 205, Mr. Justice Field said:

> "But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of

> their employes as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination." (p. 210.)

We submit that the same reasons for increasing the liability of railroad companies to employes engaged in the dangerous work of operating trains do not exist as to many of the common carriers included in the act, nor as to many of the employes of railroad companies. If the classification is not made on the basis of danger, or the character of service performed, it is difficult to conceive on what basis it could be made at all. It is true that in the *Mackey case,* Judge Field, at the conclusion said:

> "As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories." (p. 210.)

As to this statement, we submit, in the first place, that it is *obiter dictum,* and secondly, that it was not intended as a decision that the operation of canals and stage coaches *was* inherently dangerous. What the learned justice said was merely to illustrate the idea that if such occupations could be considered inherently dangerous, then a classification of such occupations with that of operating a railroad would not be arbitrary. Undoubtedly, the legislature has discretion as to classification, but that discretion will be restrained by the courts, if it appear to be exercised arbitrarily. The act involved in the *Mackey case* applied to all railroads, and the injury for which suit

was brought occurred in the operation. No question was made as to the act including those engaged in non-hazardous services.

In *Johnson* v. *St. Paul & Duluth Railroad Company,* 8 L. R. A., 419 (Minn.), the court having under consideration an action of damages arising under the Minnesota Employers' Liability Act, said:

> "Neither would it relieve the act from the imputation of class legislation that it applies alike to all railroads. It has been sometimes loosely stated that special legislation is not class, 'if all persons brought under its influence are treated alike under the same conditions.' But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought 'within its influence,' but in its classification it must bring within its influence all who are under the same conditions. Therefore, if a distinction is to be made between railway corporations and other employers as respects their liability to their employes, it must be based upon some difference in the nature of the employment, and can only extend to cases where such difference exists." (p. 419.)

And, further:

> "Therefore, after mature consideration, our conclusion is that, if any limitation is to be placed by the courts upon the application of this statute (and on constitutional grounds there must be), the only one which will furnish any definite or logical rule is to hold that it only applies to those employes who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers." (p. 420.)

In *Ballard* v. *Oil Company,* 81 Miss., 507, there was under consideration the constitutionality of an

act of Mississippi, the object of which was to abolish the fellow-servants rule so far as it affected the employes of any corporation. The court decided that:

> "The act of 1898 (Laws, ch. 66, p. 85), providing that every employe of any corporation shall have the same rights and remedies for an injury suffered by him from an act or omission of the corporation or its employes as are allowed to other persons not employes, where the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow-servant, etc., and that knowledge of defective appliances, etc., shall constitute no defense, is unconstitutional, as imposing restrictions on all corporations without reference to any differences arising out of the nature of their business, not imposed on natural persons, and, therefore, denying corporations the equal protection of the laws.
>
> "Such act cannot be held constitutional by construing it to apply only to corporations engaged in a hazardous business, and by permitting the court in such case to determine from the evidence whether the particular business engaged in was hazardous.
>
> "Whenever a statute contains on its face both constitutional and unconstitutional provisions that are not interdependent, a severance between the two and the striking out of the latter are allowable, there being in such case elements between which severance is practicable, but resorting to the evidence in a case to determine whether a subject is within the supposed intent of the general terms employed in the act, which by their plain meaning render the same unconstitutional, is not a severance, but an improper limitation of such terms by judicial construction operating to interpolate in the act what it does not contain." (pp. 507, 508.)

The opinion is able and contains a valuable review of the authorities.

Some of the State courts have held Employers' Liability Acts constitutional, even though couched in general language, and applicable to all characters of business, whether hazardous or not, this result being attained in most instances by construing such statutes, notwithstanding their general language, to apply only to hazardous occupations; but we insist that such construction is not countenanced by the Federal authorities.

In the case of *Lochner* v. *New York*, 198 U. S., 45, 59, the court, having under consideration a statute of New York limiting the hours of employes in bakeries to sixty hours a week, or ten hours a day, which it held unconstitutional, said:

> "We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employe. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy

> is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty." (p. 59.)

This case is valuable as indicative that the Supreme Court of the United States, when not bound by a limiting State Court construction, will investigate for itself the reasonableness of a classification, made by a state legislature, and unless the classification is natural and reasonable, will hold the act void. It will undoubtedly exercise the same power when an act of Congress is before it.

The most instructive case, which we have been able to find on the subject of classification is that of *Gulf, Colorado & Santa Fe Railroad Company* v. *Ellis,* 165 U. S., 150. In that case, a statute of Texas was held unconstitutional in that it placed a burden upon railroad companies for failure to pay certain debts promptly, not placed upon those engaged in other kinds of business. The court held the classification arbitrary. In the course of the opinion Mr. Justice Brewer says:

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action.
>
> "It is well settled that corporations are persons

within the provisions of the Fourteenth Amendment of the Constitution of the United States. *Santa Clara County* v. *Southern P. R. Co.*, 118 U. S., 394; *Pembina Consol. Silver Min. M. & M. Co.* v. *Pennsylvania*, 125 U. S., 181, 189; *Missouri P. R. Co.* v. *Mackey*, 127 U. S., 205; *Minneapolis & St. L. R. Co.* v. *Herrick*, 127 U. S., 210; *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S., 26; *Charlotte, C. R. Co.* v. *Gibbes*, 142 U. S., 386; *Covington & L. Turnp. Road Co.* v. *Sandford*, 164 U. S., 578. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens.

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (*Hayes* v. *Missouri*, 120 U. S., 68; *Railroad Co.* v. *Mackey*, 127 U. S., 205; *Walston* v. *Nevin*, 128 U. S., 578; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S., 232; *Pacific Exp. Co.* v. *Seibert*, 142 U. S., 339; *Giozza* v. *Tiernan*, 148 U. S., 657; *Columbia S. R. Co.* v. *Wright*, 151 U. S., 470; *Marchant* v. *Pennsylvania R. Co.*, 153 U. S., 380; *St. Louis & S. F. R. Co.* v. *Mathews*, 165 U. S., 1); yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which

do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

"As was said by Black, J., in *State* v. *Loomis*, 115 Mo., 307, 314, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employes any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable on its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void; classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land.

"In *Vanzant* v. *Waddel*, 2 Yerger, 260, 270, Catron, J. (afterwards Mr. Justice Catron of this court), speaking for the Supreme Court of Tennessee, declared: 'Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be

governed by one rule, and the mass of the community, who made the law, by another.'

"In *Dibrell* v. *Morris' Heirs,* Supreme Court of Tennessee, 15 S. W. Rep., 87 (89 Tenn., 497, 12 L. R. A., 70), Baxter, special judge, reviewing at some length cases of classification, closes the review with these words: 'We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural and not arbitrary." (Pp. 154, 155, 156.)

In *Lake Shore, &c., Ry. Co.* v. *Smith,* 173 U. S., 684, the court said:

"If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper." (Pp. 694, 695.) * * *

"And this argument also loses sight of the distinction we made above between the two cases of a general establishment of maximum rates and the enactment of discriminatory, exceptional and partial legislation upon the subject of the sale of tickets to individuals willing and able to purchase a quantity at any one time." (P. 696.) * * *

"The legislature having fixed a maximum rate at what must be presumed, *prima facie,* to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike, that no discrimination against it in favor of certain classes of married men or

families, excursionists or others, shall be made by the legislature. If otherwise, then the company is compelled at the caprice or whim of the legislature to make such exceptions as it may think proper and to carry the excepted persons at less than the usual and legal rates, and thus to part in their favor with its property without that compensation to which it is entitled from all others, and therefore to part with its property without due process of law." (P. 696.) * * *

"It is a pure, bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road and permitting them to do so at a less expense than others, provided they buy a certain number of tickets at one time." (P. 698.)

In *Atchison, Topeka & Santa Fe Railroad Co.* v. *Matthews,* 174 U. S., 96, the doctrine of the *Ellis case* was expressly approved, but the cases were differentiated. The distinctions pointed out clearly illustrate the principle. In the *Ellis case* there was under consideration a statute "allowing an attorney's fee to the plaintiffs in actions against railroad corporations on claims not exceeding in amount $50, for personal services rendered or labor done, or for damages, or for overcharges on freight, or for stock killed or injured." The court held it "to be simply a statute imposing a penalty on railroad corporations for failing to pay certain debts." While the right to classify was recognized, it was said that "such classification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted; that no mere arbitrary selection can ever be justified by calling it classification. And there is no good reason why railroad corporations alone should be punished for not paying their debts." (p. 98.)

The court also said:

> "The purpose of this statute is not to compel the payment of debts, but to secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains. This is obvious from the fact that liability for damages by fire is not cast upon such corporations in all cases, but only in those in which the fire is 'caused by the operating' of the road. (p. 98.) * * *
>
> "That there is peculiar danger of fire from the running of railroad trains is obvious. The locomotives, passing, as they do at great rates of speed, and often when the wind is blowing a gale, will, unless the utmost care is taken (and sometimes in spite of such care), scatter fire along the track. (p. 101.) * * *
>
> "On the other hand, it is also true that the equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed." (Pp. 104, 105.)

Thus, the classification is based upon the danger involved and the statute is limited to fires "caused by the operating" of the road. If the act had applied to all fires originating on all the premises of railroad

companies without regard to their nature, the decision, upon the reasoning of the case, would have followed the *Ellis case.*

The attention of the court will doubtless be called to several State decisions wherein Employers' Liability Acts have been held constitutional. These decisions are reviewed in *Callahan* v. *St. Louis Merchants Bridge Terminal Co.,* 60 L. R. A., 249, and in *Ballard* v. *Cotton Oil Company,* 81 Miss., 507.

In the cases of *Missouri Pacific Railroad Company* v. *Mackey,* 127 U. S., 205; *Minneapolis & St. Louis Railroad* v. *Herrick,* 127 U. S., 210; *Chicago, etc., Railroad* v. *Pontius,* 157 U. S., 209; *Tullis* v. *Lake Erie & Western Railroad,* 175 U. S., 348, Employers' Liability Acts of the States of Kansas, Iowa and Indiana were held constitutional by this court. It is true that the statutes involved in these cases were in broad and general terms, but it must be borne in mind that these statutes came before the Supreme Court of the United States impressed with a construction placed upon them by the courts of last resort of the States which enacted them. The State courts had limited the meaning of the general terms of these statutes so as to apply to particular classes, and the Supreme Court was to that extent bound by the State court construction of said statutes. These cases are, therefore, not authority for the proposition that the statutes involved are constitutional, under the Fourteenth Amendment, in the broad and general terms in which they were passed, but only that they are constitutional as limited and restricted in their operation by the construction which the State courts placed upon them.

In this connection it is proper to state that the opinions of the State courts on the constitutionality of the Employers' Liability Acts, in the matter of classification, are far from harmonious. See Labatt on Master & Servant, Sections 643 to 646, inclusive.

The question now under consideration when reduced to its last analysis, amounts to this: Is not a classification arbitrary, which makes *all common carriers* engaged in interstate commerce liable to *any* servant for the negligence of a fellow-servant, regardless of the fact that the business of many common carriers is in no way hazardous, and regardless of the further fact that as to common carriers conducting a hazardous business, there are only a limited number of employes exposed to such hazards? Can a classification, which abolishes the fellow-servants' doctrine in the shops of a railroad company, where cars are built, but which does not abolish the fellow-servants' doctrine in similar shops of a car building company, both companies being engaged in interstate commerce, be defended? Is a classification constitutional which makes common carriers engaged in interstate commerce liable to an employe in respect of machinery when others engaged in interstate commerce are left to a different rule of liability in respect of like machinery, operated under like conditions? Can Congress enact that common carriers engaged in interstate commerce cannot make certain contracts with their employes and leave others engaged in interstate commerce free to make such contracts with employes who are engaged in like services and under similar conditions?

If this classification both as to carriers and employes

can be sustained, and if such legislation is a regulation of interstate commerce, then Congress upon the same principles can regulate the hours of work, the wages, the liability *inter sese* for negligence, and the right to refuse to work, of all employes of those engaged in interstate commerce, regardless of the character of the services in which such employes are engaged.

IV.

CASES SUSTAINING THE ACT.

On March 2, 1907, Judge Hanford, in *Plummer* v. *Northern Pacific Railway Co.*, held this act constitutional. The case was before him upon a petition to set aside a verdict, and the verdict was set aside, upon the ground that the injury occurred prior to the passage of the act. A decision upon the constitutionality of the act was not necessary. The opinion is based mainly on the proposition that the power sought to be exercised in the act is the same as that involved in maritime jurisdiction and the navigation of the public waters, and that the cases on those subjects are of like authority when applied to trade and commerce on land.

He says:

> "Regulations of commerce are rules to be obeyed in carrying on the business of buying, selling, exchanging, transferring and moving the property which is the subject of traffic, and to be effective such regulations must not only control the conduct of merchants, bankers, and others engaged as principals in the business, but their

> servants and agents, and the carriers who serve them in the transportation of property from one place to another, and those who furnish the facilities for communication between distant points which aid the business. * * * The employes who work for wages in every branch of the business, giving life and mobility to trade are equally subject to regulations of commerce as those whom they serve, and regulations prescribing their rights and obligations with respect to their employment not only affect commerce but regulate commerce."

This carries the effect of the act to its utmost limits and his opinion, founded as it is upon the predicate that the power exercised in maritime jurisdiction is identical with that exercisable in respect to trade and commerce between the states, announces a doctrine in respect of laborers on land that would if carried into effect create a revolution. Little did those labor leaders who so earnestly advocated the passage of this act suppose that a court in finding ground upon which to sustain it would rest its decision upon a doctrine which would give Congress power to compel the servants of those engaged in interstate commerce to perform the obligations of their contracts and forfeit their wages for desertion. Such a doctrine might make the law very attractive to those who delight in a strong government when it affords them the means of dominating their labor.

For instance, Sec. 4596, U. S. Compiled Statutes, 1901, provides that a seaman upon neglecting or refusing to join his vessel or proceed to sea may be subjected to a forfeiture of wages or imprisonment; for quitting his vessel without leave after arrival at port, his wages may be forfeited; for willfully disobeying

any lawful command at sea, he may be placed in irons, his wages may be forfeited, or he may be imprisoned; for continued willful disobedience to a lawful command at sea, he may be placed in irons on bread and water, his wages may be forfeited and he may be imprisoned for three years; for assaulting any master or mate, he may be imprisoned for two years; for willfully damaging the vessel or embezzling or damaging the stores, his wages may be forfeited and he may be imprisoned for twelve months.

The only other reason given for sustaining the act is the decision in *Johnson* v. *Southern Pacific Co.*, 196 U. S., 1, 22. It is erroneously assumed that the court in that case necessarily affirmed the constitutionality of the act. No note is taken of the fact that the act in the *Johnson case* prescribed rules and regulations, and that the right of recovery was merely incidental, while in the act under consideration no rules are prescribed and the provision for liability constitutes the whole of the act, nor of the further fact that the former applies only to those working with the instrumentality of commerce, while the latter embraces all employes of the interstate carrier, regardless of their occupations.

In the unreported case of *Spain* v. *St. Louis & San Francisco Railroad Company,* Judge Trieber held this act to be constitutional. He did not defend those features regulating employes not engaged in interstate commerce.

He stated the question which he considered, as follows:

"Has Congress under that provision of the

> Constitution, Section 8 of Article 1, the power to enact legislation regulating the employment of those necessarily required to manage the vehicles necessary for the transportation of interstate commerce?"

He had in mind "*regulating the employment*" and only of those "*necessarily required to manage the vehicles necessary for the transportation of interstate commerce.*"

He was of the opinion that the authorities cited by him sustained the power of Congress under the Constitution *to legislate for the safety and protection of employes engaged in interstate commerce* whether the transportation be by water or land. This is beyond dispute. On this partial view he sustained the act. It does not appear that he thought that there was any possible difference between legislating for the safety and protection of employes, and giving a mere right of action for injury. He does not bridge, or even leap the chasm, but ignores it. The question which he stated and decided is essentially different from what we understand to be involved. He did not uphold the constitutionality of the act as applied to servants employed solely in transportation within the state, and those not employed in transportation at all, but held that the act was separable and that those features applying to employes engaged in interstate commerce were valid.

On March 25th his Honor, Judge Speer, in *Snead, Administratrix,* v. *Central of Georgia Railway Company,* held the act constitutional.

He based his conclusion largely upon the authority

of maritime cases which have been discussed in the brief, and after citing them, concluded as follows:

> "If then Congress has the established right to control the relative duties of the ship owners and the seamen, both of whom are instrumentalities of commerce, both absolutely essential to its proper and effective conduct, or any conduct, upon what sound reasoning can its control of the rights and liabilities of other men engaged in the transportation by land of the same commerce be denied?"

He limited the operation of the act to employes engaged in interstate commerce, saying:

> "It operates neither expressly nor impliedly upon employes or carriers in solely intrastate traffic. * * *
>
> It is seeking to protect the employes who are the instruments and agents of commerce."

V.

CONCLUSION.

The importance of this case cannot be overstated. The act raises constitutional questions of the utmost gravity. No one would question that a decision sustaining it must necessarily extend the power of the Federal Government over a field hitherto not contemplated as within its jurisdiction. A decision holding the act unconstitutional, would not destroy any generally prevailing understanding as to the relations between the several states and the United States, or open up any wide field for serious conjecture or apprehension. It would but continue the order of things to which our minds are habituated. We know what kind of a government we have had, with the states controlling the rights and relations between its citizens in respect of contracts, property and legal liabilities touching all

matters not imposing a burden or restriction upon interstate commerce, and the United States regulating interstate commerce, and those things essentially correlated with it. No one, however versed in the science of government, and the teachings of history, can forecast the changes that the establishment of the principle involved will work in our state and national life, or what kind of government we will have, when these principles thus sanctioned shall hereafter be invoked and applied. The act has all the prestige that can be derived from the combined sanction of the legislative and executive departments of government. As was said by the Chief Justice in the great case of *Gibbons* v. *Ogden*, which is and must ever be the original source from which all discussion upon the commerce clause of the Constitution proceeds, it may be said of this act:

> "It is supported by great names—by names that have all the titles to consideration that virtue, intelligence, and office, can bestow. No tribunal can approach the decision of this question, without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them with that independence which the people of the United States expect from this department of government." (p. 186.)

It is respectfully submitted that the act of June 11, 1906, is unconstitutional, and that the judgment of the lower court should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1906.

No. 587.

DAMSELLE HOWARD, Administratrix of Will Howard, deceased,
Plaintiff in Error,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, and THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

SUPPLEMENT TO BRIEF FOR DEFENDANTS IN ERROR.

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SUNTHORP-WARREN PRINTING CO., CHICAGO

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SUPPLEMENT TO BRIEF FOR DEFENDANTS IN ERROR.

EXTRACTS FROM THE DEBATES IN CONGRESS UPON THE EMPLOYERS' LIABILITY ACT.

From the following it is perfectly manifest that it was understood by both houses of Congress that the act applied to *all* employes of those common carriers engaged in interstate commerce, without regard to the work in which such employes might be engaged, that the *entire jurisdiction* over personal injuries to employes of interstate carriers was to be

vested in the Federal courts and that the laws of the several states upon the same subject would be superseded by the act.

Senator Bacon of Georgia:

"The bill, as it appeared to the committee, is an extremely far-reaching measure, one, so far as I know, absolutely novel in its provisions and in the purposes which it seeks to accomplish. If it were a bill which sought to fix the rule of the liability of railroad companies to its employes in the District of Columbia or in the territories, there would be no question that it would be a bill which should go to the Judiciary Committee. But the bill goes very much farther than that. In fact, that feature of it is infinitesimal compared with that which it embraces in its totality.

It is a bill which proposes to fix *the rule of the liability of railroad companies for damages to employes not simply in the District of Columbia or in the Territories, but the rule of damages in all cases and in all jurisdictions of railroads which are engaged in interstate commerce, and as almost every railroad in the United States of any consequence is engaged in interstate commerce it may be said to be practically a bill which proposes to take away from the state the right to fix what shall be the rule of damages in case of an injury to an employe by a railroad company in that state and to have a rule of damages which shall be enacted by the Congress of the United States applied to every railroad in the United States that is engaged in interstate commerce. This would also necessarily devolve upon the Federal courts in each state the jurisdiction to try all cases against railroad companies in suits against them to recover damages for personal injuries.* The magnitude of that question must strike everyone without any comment upon it whatever. The Senate will perceive that the great question presented by the bill is not the question,

as suggested, simply whether this is a correct rule of damages, *but whether or not under the interstate-commerce provision of the Constitution it is a matter within the jurisdiction of the Congress of the United States to pass a law which shall fix the rule of liability for damages in all cases in the United States in suits for personal injuries to employes.* * * *

But as to whether or not the Congress of the United States shall hereafter have jurisdiction to fix the question of what shall be the liability of a railroad company in California, or in Maine, or in Louisiana, or Texas, or Pennsylvania, and whether *each of these states and all other states shall thereafter surrender the right to fix the question of the liability of railroads for such damages, and shall surrender the jurisdiction of the state courts to try such cases and turn them all over to the Federal courts, is an immense question.* * * *

So I am not arguing as to anything which would affect my state or change the law from what it now is, except in so far as it would take the jurisdiction *in all such cases from our state courts and* confer the same *upon the Federal courts, which would be a great hardship on the railroad employes.*"

Congressional Record, January 30, 1906, Vol. 40, part 2, p. 1747.

Congressman Sterling, who moved in the house the suspension of the rules and the passage of the bill, referring to the Act, said, page 4601, Congressional Record, 59th Congress, Vol. 40, part 5:

"It simply provides that they shall recover for an injury caused by the negligence of the company or *any* employe of the railroad company."

Mr. Bartlett, inquiring of Mr. Sterling "as to the construction or intention" of the Act, said, page 4602:

"but I want to inquire what the gentleman thinks is the effect of this Act—whether it relates to an injury inflicted by a railroad engaged in interstate commerce, but the suit is brought for damages inflicted *while the railroad is engaged in transactions of business which at the instance* [instant?] *is not* interstate commerce?"

Mr. Sterling in reply, said, page 4602:

"I will say in reply to the gentleman that, in my opinion, it will affect the railroads engaged in interstate commerce whether the particular train, *or the particular employe* that is engaged on any particular train, happens to be at the time engaged in carrying commerce from one state to another or *not.*"

Mr. Bartlett further asked, page 4602:

"Suppose suit is brought for an injury happening under circumstances which the gentleman has last detailed, and suit is brought in the state court, *and the state has a law different* from the one we have here—for instance, as is the law in the State of Georgia, which does not allow the doctrine of comparative negligence—how will this proposed Act affect it?"

Mr. Sterling replied, page 4602:

"I think there is no doubt that this statute, within its scope, *would control the statutes of the several states.*"

Mr. Parker, quoting from the minority report, said, page 4606:

"But these questions should be governed by the law of the state having jurisdiction of the employment, and the jurisdiction of the contract of service should not be made national because the employer is engaged in interstate commerce. The attempt to pass such a law will cause inextricable confusion as to where the state and national law

should govern, *especially in the case of local employes.*"

He further said, page 4606:

"It is a question whether we can legislate *as to all employes, as for example if a couple of men are shoveling dirt into a railroad car and one happens to hit the other with a shovel.*" * * *

"I do not believe in that legislation which will cause this result, and I doubt also whether it be constitutional *to take all questions between employer and employe away from the state.*"

Mr. Parker further said, page 4606:

"Mr. Speaker, there is no contract, except perhaps that of marriage, which goes deeper into those personal rights of man and man which are reserved to the states than the contract of employment and the rights as between employer and employe, as well as the right of suit for personal injury caused by the negligence of another. I cannot believe that it is for the benefit of the people of the United States *that the jurisdiction of the states over these matters should be infringed.*"

Mr. Keifer said, page 4606:

"I do not believe that under that provision of the Constitution of the United States, such a law is constitutional because it is regarded as regulating interstate commerce. * * *

Now, it is said we have the power to regulate commerce and provide rules that are to be applied in court in determining the measure of damages between litigants. Does that regulate commerce? Is there a decision of any court in the United States that recognizes that principle? *If it is not constitutional in that respect, it is wholly unconstitutional.*"

* * * * *

"It is not regulation of interstate commerce to provide that contracts between railroad com-

panies as to insurance shall be void. So as to fixing a rule of recovery by an employe against a railroad company."

Mr. Driscoll said, page 4603:

"Let us analyze this first section. According to it a railroad company shall be liable *to its employes for all damages which may result* from the negligence of *any* of its officers, agents *or employes,* and so forth. That is clear enough and not open to more than one construction."

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 594.

N. C. BROOKS, ADMINISTRATRIX OF MORRIS S. BROOKS, DECEASED, PLAINTIFF IN ERROR,

vs.

SOUTHERN PACIFIC COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

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a UNITED STATES OF AMERICA,
Western District of Kentucky, Sixth Judicial Circuit, ss:

The President of the United States to the honorable the judges of the Circuit Court of the United States for the Western District of Kentucky, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you or some of you, between N. C. Brooks, administratrix of Morris S. Brooks, deceased, plaintiff, against Southern Pacific Company, defendant, a manifest error hath happened, to the great damage of the said N. C. Brooks, administratrix of Morris S. Brooks, deceased, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at city of Washington on the 9th day of February next, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of January, in the year of our Lord one thousand eight hundred and ninety-seven, and of the independence of the United States of America the one hundred and thirty-first.

[SEAL.] A. G. RONALD,
Clerk of the Circuit Court of the United States,
Western District of Kentucky.

Allowed by—

WALTER EVANS, *Judge.*

Filed January 25th, 1907.

A. G. RONALD, *Clerk U. S. C. C., W. K. D.*
By HENRY F. CASSIN, *D. C.*

b UNITED STATES OF AMERICA,
Western District of Kentucky, Sixth Judicial Circuit, ss:

To Southern Pacific Company, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington on the 9th day of February next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Western District of Kentucky, wherein N. C. Brooks, administratrix of Morris S. Brooks, deceased, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as

in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, this 25th day of January, in the year of our Lord one thousand nine hundred and seven, and of the independence of the United States of America the one hundred and thirty-first.

WALTER EVANS, *Judge.*

[SEAL.]

Filed January 25th, 1907.

A. G. RONALD, *Clerk, U. S. C. C., W. K. D.*
By HENRY F. CASSIN, *D. C.*

Service acknowledged this Jan. 26, 1907.

ALEX P. HUMPHREY,
Counsel Southern Pacific Company.

1 Proceedings of the Circuit Court of the United States for the Western District of Kentucky at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, October 8, A. D. 1906.

Present, Hon. Walter Evans, sitting as circuit judge.

N. C. BROOKS, ADMINISTRATRIX OF THE ESTATE OF Morris S. Brooks, deceased, plaintiff,
vs.
THE SOUTHERN PACIFIC COMPANY, DEFENDANT. } No. 7091.

Be it remembered, that heretofore, to wit, on the 29th day of September, A. D. 1906, came the plaintiff, by William M. Smith and Torrence & Bloss, her attorneys, and filed in the clerk's office of our said court her petition against the above-named defendant, which petition is in the words and figures as follows, to wit:

In the Circuit Court of the United States for the Western District of the State of Kentucky.

N. C. BROOKS, ADMINISTRATRIX OF THE ESTATE OF Morris S. Brooks, deceased, plaintiff,
vs.
THE SOUTHERN PACIFIC COMPANY, A CORPORATION, defendant. } Petition.

Plaintiff, N. C. Brooks, administratrix of Morris S. Brooks, deceased, states and charges that she is the duly appointed, qualified, and acting administratrix of the estate of Morris S. Brooks, deceased, under and by virtue of appointment by the Probate Court of Cowley County, State of Kansas, and that she is now and was at the time hereinafter stated, a citizen, resident and inhabitant of said county and State; and that said Morris S. Brooks was, at the time of

2 his death, as hereinafter stated, a citizen, resident and inhabitant of said county and State, and that said probate court of said county and State had jurisdiction, authority, and power to

grant said letters of administration, a duly certified copy of which are here filed as part hereof, marked "Exhibit A."

She institutes this suit for the benefit of the parents of said Morris S. Brooks, deceased, he leaving no widow or children.

That the defendant, The Southern Pacific Company, was, on the date hereinafter stated, to wit, June 16th, 1906, and is now, a corporation duly organized and chartered under and by virtue of the laws of the State of Kentucky, and as such was and is duly authorized and impowered to contract and be contracted with, sue and be sued in said corporate name, and to engage in the business of a common carrier in the States of California, Nevada, Utah, and other States of the United States of America, and to engage in said business of common carrier between said several States, and that said Southern Pacific Company is now a citizen of the State of Kentucky and an inhabitant and resident of the Western Judicial District of said State.

Plaintiff says that the controversy herein is between citizens of different States, and the matter in dispute exceeds, exclusive of interest and costs, the sum of $2,000.00, to wit, $25,450.00. And said cause of action arises under the laws of the United States.

Plaintiff says that as such common carrier the defendant, The Southern Pacific Company, was, on and prior to the 16th day of June, 1906, engaged as a common carrier in trade and commerce through and between the said several States of California, Nevada, and Utah and other States of the United States of America, and was operating a line of railroad between and through said States, and which said line of railroad runs through the towns of Sparks and Gilpin in the said State of Nevada; that on the 16th day of June, 1906, and for a long time prior thereto, Morris S. Brooks was an employee and servant of said defendant as fireman on one of its engines used in hauling commerce, freight, and passengers
3 through and between the several States aforesaid; that no said 16th day of June, 1906, the said defendant was engaged in the hauling and transportation of two of its trains through and between said several States, laden with fruit, freight, and merchandise and other commodities which it was then transporting from the State of California into, through, and between the said States of California, Nevada, and Utah, and that the said defendant, The Southern Pacific Company, by its officers and agents, ordered and directed that said trains should leave the town of Sparks, in the State of Nevada, going towards the east, ten minutes apart, and run in that manner to the town of Gilpin, in the State of Nevada, a town about twenty-five miles east of the said town of Sparks, and on eastward; that the first of said trains, being an extra freight, No. 1767, left the town of Sparks about 2.30 p. m. on the 16th day of June, 1906, running to the town of Gilpin, and there stopped and stood upon the main track for a long time, to wit, more than twenty minutes; that just west of the town of Gilpin there is a sharp curve in the track, and that such train, so stopping at Gilpin as aforesaid, stood upon

the main track within about 200 feet of the said curve during the said time hereinbefore mentioned; that on said 16th day of June, 1906, the second train herein mentioned left the town of Sparks about twenty minutes after the first train mentioned herein had departed from said station, and ran in its ordinary and usual time to the town of Gilpin; that the said Morris S. Brooks was at said time the servant and employee of said defendant and engaged in firing its engine No. 3006, which was attached to the said second train, and which train left the town of Sparks at about 2.50 p. m.; that when the said first train, to wit, extra No. 1767, arrived at the town of Gilpin and remained there the length of time aforesaid it was the duty of the officers, agents, and employees of said railway company, and of the conductor, brakeman, and other agents and servants in charge of said train, to either place said train upon the sidetrack or flag the train hauled by engine No. 3006 immediately following, but, notwithstanding its duty, the said defendant did not place said train upon the sidetrack and did not flag or cause to me flagged said train hauled
4 by engine No. 3003, but wilfully, wantonly, and negligently failed to do so; that said Morris S. Brooks was busily engaged in firing his engine when the same approached the curve near Gilpin herein mentioned, and did not discover that said train No. 1767 was standing upon the main track of said railway until after the said train hauled by engine No. 3006, as aforesaid, had rounded the curve and was within a few feet of the rear of said train; that then and there the engineer on No. 3006 left his engine, and before the said Morris S. Brooks, fireman as aforesaid, could jump from the engine or take any precaution to protect himself the said engine crashed into the rear end of said train No. 1767, and the said Morris S. Brooks was crushed and mortally wounded under his engine, and the wreck and débris consequent upon said collision, from which wounds he immediately died.

Plaintiff further avers that the defendant, its agents, employees, and servants were wilfully and grossly negligent in running said trains over said road in such close proximity to one another, and was negligent in permitting said train to stand upon the main track of said road, knowing that said train, hauled by engine No. 3006, was to follow him within ten minutes of the time of the said train No. 1767, and that said railway company was wilfully, wantonly, and grossly negligent in not requiring said first train, No. 1767, to either sidetrack or properly flag the train on which Morris S. Brooks, deceased, was firing, and that the engineer on said engine No. 3006 negligently failed to see the other train and negligently failed to stop his engine in time to avoid the collision, and that by reason of said negligence of the defendant and its agents, employees, and servants in the premises said Morris S. Brooks, without any fault on his part, was, by said defendant, its agents, officers, and employees, killed and murdered.

Plaintiff further states that the deceased, Morris S. Brooks, was an unmarried man at the time of his death, and left neither widow

nor children, and that he was a son of this plaintiff, N. C. Brooks, and her husband, A. J. Brooks, and that they, N. C. Brooks and A. J. Brooks, are the parents of the said Morris S. Brooks, and dependent upon him for support, and was, at the time and
5 prior to his death, receiving from the said Morris S. Brooks large sums of money, which he, the said Morris S. Brooks, contributed toward their support; that the said Morris S. Brooks was a young man, about twenty-six years old, at the time of his death, in good health, and was an active, honest, and diligent fireman, with more than ordinary intelligence and interest in his work, and had and possessed a strong desire to earn advancement and increase his capacity for making money to assist said parents; that said Morris S. Brooks was a young man of excellent character, saving and economical in his disposition, and at the time of his death capable of earning about $150 per month; that the plaintiff brings this action as the personal representative of the said Morris S. Brooks, deceased, for the benefit of N. C. Brooks, the plaintiff, and the said A. J. Brooks, his parents, and next of kin, and that by reason of the wrongs and injuries hereinbefore states the said N. C. Brooks and A. J. Brooks, parents of Morris S. Brooks, deceased, and the estate of the said Morris S. Brooks, have been damaged in the sum of $25,000.

That by reason of the wrongs and injuries hereinbefore mentioned and complained of, and by reason of the negligent killing of the said Morris S. Brooks, the plaintiff has been obliged to pay the sum of $150 funeral expenses of the said Morris S. Brooks, and has incurred the further expenses of a metal casket and the transportation of the body from Gilpin, Nevada, to his home, in Winfield, Kansas, of the sum of $300. That all of said expenses were necessary, and the charges were reasonable.

Wherefore plaintiff prays judgment against the defendant for the sum of $25,450 and for the costs of this action, and for such other relief as she may be entitled to upon a hearing hereof.

[SEAL.] W. M. SMITH AND TORRANCE & BLOSS,
Attorneys for Plaintiff.

W. M. Smith says that he is attorney for plaintiff in above action, who is now absent from the county of Jefferson and State of Kentucky, and that the statements contained in the above petition are, as he verily believes, true.

W. M. SMITH.

Subscribed and sworn to before me by W. M. Smith, Sept. 29, 1906.

WM. M. SALE,
Notary Public, Jefferson Co., Ky.

My commission expires March 3, 1910.

6 Upon which petition there issued the following summons:

The President of the United States of America to the marshal of the Western Kentucky District, greeting:

You are hereby commanded to summon the Southern Pacific Company to answer on the first day of the next March term of the Circuit Court of the United States for the Western District of Kentcuky, to be held at the city of Louisville, a petition against it in said court by N. C. Brooks, administratrix of the estate of Morris S. Brooks, deceased, and warn it that upon its failure to answer the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons on the first day of the next term of said court.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Louisville, in the said district, this 29th day of September, in the year of our Lord 1906 and of our independence the 131st.

[SEAL.] A. G. RONALD, *C. C. C., W. K. D.*

Upon which the marshal made the following return:

Received the within summons and one copy at Louisville, Ky., Sept. 29, 1906, and executed same day on the Southern Pacific Company, by delivering a true copy of the within summons to J. B. Weaver, assistant secretary of said company, he being the highest officer found in my district and being the party on whom service was designated to be made, at his office in the Kentucky Title Building, Louisville, Kentucky.

This Oct. 1st, 1906. G. W. LONG, *U. S. Marshal.*
By BEN L. BRUNER, *Chief Deputy.*

7 And on another day of said term of said court, continued and held, to wit, on the 16th day of November, 1906, came the plaintiff, by W. M. Smith, her attorney. Came also the defendant, by Humphrey & Humphrey, its attorneys. The defendant by its attorneys filed its demurrer to the plaintiff's petition herein, and by consent of parties it is ordered that said demurrer be set for oral argument December 17th, 1906.

The demurrer above referred to is as follows, to wit:

Circuit Court of the United States, Sixth Circuit Western District of Kentucky.

N. C. BROOKS, ADMINISTRATRIX OF THE ESTATE OF MORRIS S. BROOKS, deceased, plaintiff,
vs.
THE SOUTHERN PACIFIC COMPANY, A CORPORATION, defendant. } Demurrer.

The defendant, the Southern Pacific Company, demurs to the petition herein upon the ground that the facts stated in said petition are not such as to constitute a cause of action against this defendant.

Wherefore defendant prays that said petition may be dismissed; for its costs and all proper relief.

HUMPHREY & HUMPHREY,
Attorneys for Defendant.

And on another day of said term of said court, continued and held, to wit, on the 17th day of December, 1906, came the plaintiff, N. C. Brooks, administratrix of Morris S. Brooks, deceased, by W. M. Smith and J. E. Torrance, her attorneys. Came also the defendant, The Southern Pacific Company, by Humphrey & Humphrey, its attorneys. Came again the plaintiff by her said attorneys and withdraws from the petition and moves the court to dismiss therefrom so much of the cause of action set up therein as seeks to recover $150.00 for funeral expenses and $300.00 for a metal casket and transporta- of the body from Gilpin, Nevada, to Winfield, Kansas. And the court being fully advised thereof, it is ordered that said motion
8 be, and the same is hereby, sustained, and so much of the plaintiff's cause of action as seeks to recover $150.00 for funeral expenses and $300.00 for metal casket and transportation of the body from Gilpin, Nevada, to Winfield, Kansas, be, and the same is hereby, dismissed. Came again the plaintiff by her attorneys and filed certified copy of letters of administration from the probate court of Cowley County, State of Kansas, together with a copy of order of the Jefferson County Court, State of Kentucky, approving bond of administratrix and authorizing and empowering her to institute and prosecute actions in the State of Kentucky.

Came again the defendant, by its said attorney, and withdrew its demurrer to the petition herein. Thereupon the plaintiff, by her attorneys, filed an amended petition herein. Came again the defendant, by its attorney, and refiled its demurrer to the plaintiff's petition as amended.

This case coming on to be heard upon the defendant's demurrer to the plaintiff's petition herein, and having been argued by counsel and the court, not being fully advised thereof, takes time.

The certified letters of administration from the Cowley County Court, Kansas, above referred to, are as follows:

THE STATE OF KANSAS,
County of Cowley, ss. In Probate Court.

To all to whom these presents shall come, greeting:

Know ye, that whereas Morris S. Brooks, late of the said county of Washoe, State of Nevada, died intestate, as it is said, having at the time of his death property in this State which may be lost, destroyed, or diminished in value if speedy care be not taken of the same.

To the end, therefore, that said property may be collected, preserved, and disposed of according to law, we do hereby constitute and appoint N. C. Brooks, of said county, administratrix of all and singular the goods and chattels, rights and credits, whereof the said

Morris S. Brooks was possessed at the time of his death, with full power and authority to secure and dispose of said property according to law, and collect all moneys due said deceased, and in gen-
9 eral to do and perform all other acts and things which are, or hereafter may be, required of her by law or the decree or order of any court having jurisdiction.

In testimony whereof I, F. W. Miller, judge of the Probate Court in and for said county, do hereunto set my hand and affix the seal of said court this 6th day of July, A. D. 1906.

[SEAL.] F. W. MILLER,
Probate Judge.

STATE OF KANSAS,
Cowley County, ss. Probate Court.

I, F. W. Miller sole judge and ex officio clerk of the Probate Court within and for the county aforesaid, do hereby certify the foregoing to be a true and correct copy of the letters of administration issued from this court to N. C. Brooks, as administratrix of the estate of Morris S. Brooks, deceased, late of Washoe County, State of Nevada, as the same appears from the records of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Winfield, this 7th day of Dec., A. D. 1906.

[SEAL.] F. W. MILLER,
Probate Judge and Ex Officio Clerk.

STATE OF KANSAS,
Cowley County, ss:

I, F. W. Miller, sole judge of the Probate Court within and for said county, the same being a court of law and record, hereby certify that the signature attached to the above certificate, purporting to be that of F. W. Miller, is his genuine signature, and that he was at the time thereof ex officio clerk of said Probate Court, and, as such, full faith and credit are due his acts; and that the attestation of said clerk is in due form of law and by the proper officer.

Witness my hand and the seal of said court, at Winfield, this 7th day of Dec., 1906.

[SEAL.] F. W. MILLER, *Probate Judge.*

10 The copy of order of Jefferson County Court above referred to is as follows, to wit:

December Term County Court, December 15th, 1906.

STATE OF KENTUCKY, *Jefferson County:*

In the matter of N. C. Brooks, administratrix of Morris S. Brooks, deceased, late of the State of Nevada.

The petition of N. C. Brooks, administratrix of the estate of Morris S. Brooks, deceased, having been duly filed herein, together with letters of administration from the probate court of Cowley County,

State of Kansas, it is ordered by the court that said N. C. Brooks, as administratrix of Morris S. Brooks, deceased, be and she is hereby permitted to execute bond to the Commonwealth of Kentucky with a resident surety conditioned to pay any debt due by decedent to any resident of this State to the extension of the assets that shall come to her hand, and thereupon said administratrix tendered in court such bond with the American Surety Company, of New York, as surety, conditioned as required by law and said bond is approved and accepted, and such administratrix is hereby authorized and empowered to institute and prosecute all actions in this State.

A copy.

Attest: W. J. SEMONIN, *Clerk*,
By GEO. E. SCHENK, *D. C.*

The amended petition above referred to is as follows, to wit:

In the Circuit Court of the United States in and for the Western District of the State of Kentucky.

N. C. BROOKS, ADMINISTRATRIX OF THE ESTATE of Morris S. Brooks, deceased, plaintiff, *vs.* THE SOUTHERN PACIFIC COMPANY, A CORPORATION, defendant.	No. . Amended petition.

Plaintiff, N. C. Brooks, administratrix of Morris S. Brooks, deceased, states and charges, that she is the duly appointed, qualified, and acting administratrix of the estate of Morris S. Brooks, deceased, under and by virtue of appointment by the Probate Court of
11 Cowley County, State of Kansas, and that she is now and was at that time hereinafter stated, a citizen, resident, and inhabitant of said county and State; and that said Morris S. Brooks was, at the time of his death, as hereinafter stated, a citizen, resident, and inhabitant of said county and State, and had at the time of his death personal property in said county and that said probate court of said county and State, had jurisdiction, authority, and power to grant said letters of administration, a duly certified copy of said authority is hereto attached under mark of "Exhibit A," and made a part hereof.

That the plaintiff has duly filed with the County Court of Jefferson County, Kentucky, a duly authenticated copy of her letters testamentary, hereinabove described, and has executed and filed a bond with said Probate Court, with good sureties resident of the county of Jefferson and State of Kentucky, conditioned to pay any debt due by the said Morris S. Brooks, decedent, to any resident of the State of Kentucky, to the extent of the assets which shall come into her hands, which bond has been filed and approved by the Probate Court of said county; and this plaintiff is authorized by said court

to proceed with the prosecution of this action in this court. A duly certified copy of said authority is hereto attached, marked "Exhibit B," and made a part hereof.

She institutes this suit for the benefit of the parents of said Morris S. Brooks, deceased, he leaving no widow or children.

That the defendant, the Southern Pacific Company, was, on the date hereinafter stated, to wit, June 16, 1906, and at the time of the commencement of this action, and is now, a corporation duly organized and chartered under and by virtue of the laws of the State of Kentucky, and as such was and is duly authorized and empowered to contract and be contracted with, sue and be sued in said corporate name, and to engage in the business of a common carrier in the States of California, Nevada, Utah, and other States of the United States of America to engage in said business of common carrier between said several States, and that said Southern Pacific Company is now a citizen of the State of Kentucky and an inhabitant and resident of the Western Judicial District of said State.

12 Plaintiff says that the controversy herein is between citizens of different States, and the matter in dispute exceeds, exclusive of interest and costs, the sum of $2,000, to wit, $25,000; and said cause the action arises under the laws of the United States, to wit, an act of Congress approved June 11, 1906, entitled "An act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and foreign nations to their employees."

Plaintiff says that as such common carrier the defendant, the Southern Pacific Company, was, on and prior to the 16th day of June, 1906, engaged as a common carrier in trade and commerce through and between the said several States of California and Nevada and Utah and other States of the United States of America, and was operating a line of railroad between and through said States, and which said line of railroad runs through the towns of Sparks and Gilpin, in the said State of Nevada; that on the 16th day of June, 1906, and for a long time prior thereto, Morris S. Brooks was an employee and servant of said defendant as fireman on one of its engines used in hauling commerce, freight, and passengers through and between the several States aforesaid; that on said 16th day of June, 1906, the said defendant was engaged in the hauling and transportation of two of its trains through and between said several States, laden with fruit, freight, and merchandise, and other commodities which it was then transporting from the State of California into, through, and between the said States of California, Nevada, and Utah; and that the said defendant, the Southern Pacific Company, by its officers and agents, ordered and directed that said trains should leave the town of Sparks, in the State of Nevada, going towards the east, ten minutes apart, and run in that manner to the town of Gilpin, in the State of Nevada, a town of about twenty-five miles east of the said town of Sparks, and on eastward; that the first of said trains being an extra freight, No. 1767,

left the town of Sparks about 2.30 p. m. on the 16th day of June, 1906, running to the town of Gilpin, and there stopped and stood upon the main track for a long time, to wit, more than twenty
13 minutes; that just west of the town of Gilpin there is a sharp curve in the track, and that said train so stopping at Gilpin, as aforesaid, stood upon the main track within about 200 feet of the said curve during the said time hereinbefore mentioned; that on said 16th day of June, 1906, the second train herein mentioned left the town of Sparks about twenty minutes after the first train mentioned herein had departed from said station and ran its ordinary and usual time to the town of Gilpin; that the said Morris S. Brooks was at said time the servant and employee of said defendant and engaged in firing its engine No. 3006, which was attached to the said second train and which train left the town of Sparks at about 2.50 p. m.; that when the said first train, to wit, extra No. 1767, arrived at the town of Gilpin and remained there the length of time aforesaid it was the duty of the officers, agents, and employees of said railway company, and of the conductor, brakeman, and other agents and servants in charge of said train to either place said train upon the side track or flag the train hauled by engine No. 3006 immediately following; but, notwithstanding its duty, the said defendant did not place said train upon the side track and did not flag or cause to be flagged said train hauled by engine No. 3006, but wilfully, wantonly, and negligently failed to do so; that said Morris S. Brooks was busily engaged in firing his engine when the same approached the curve near Gilpin, herein mentioned, and did not discover, and by reason of his other duties, the curve and other obstructions, and was not in a position to discover that said train No. 1767 was standing upon the main track of said railway until after the said train, hauled by engine No. 3006, as aforesaid, had rounded the curve and was within a few feet of the rear of said train; that then and there the engineer on No. 3006 left his engine, and before the said Morris S. Brooks, fireman as aforesaid, could jump from the engine or take any precaution to protect himself the said engine crashed into the rear end of said train No. 1767, and the said Morris S. Brooks was crushed and mortally wounded under his engine, and the wreck and débris consequent upon said collision, from which wound he immediately died.

14 Plaintiff further avers that the defendant, its agents, employees, and servants, were wilfully and grossly negligent in running said trains over side road in such close proximity to one another, and were negligent in permitting said train to stand upon the track of *side* road, knowing that said train hauled by engine No. 3006 was to follow within ten minutes of the time of the said train No. 1767, and that said railroad company was wilfully, wantonly, and grossly negligent in not requiring said first train No. 1767 to either side track or properly flag the train on which Morris S. Brooks, deceased, was firing, and that the engineer on said engine No. 3006 negligently failed to see the other train and negligently failed to stop his engine in time to avoid the collision, and that by reason of

said negligence of the defendants' employees and servants in the premises, said Morris S. Brooks, without any fault on his part, was by the defendant, its agents, officers, and employees killed.

Plaintiff further states that the deceased, Morris S. Brooks, was an unmarried man at the time of his death, and left neither widow nor children, and that he was the son of this plaintiff, N. C. Brooks, and her husband, A. J. Brooks, and that they, N. C. Brooks and A. J. Brooks, are the parents of the said Morris S. Brooks and dependent upon him for support, and were at the time and prior to his death receiving from the said Morris S. Brooks large sums of money which he, the said Morris S. Brooks voluntarily regularly contributed toward their support; that the said Morris S. Brooks was the only son of the said N. C. Brooks and A. J. Brooks and was ever affectionate and extremely anxious for their welfare, so much so that in addition to sending and giving them a large portion of his earnings up to the time of his death, he frequently inquired of them if they needed any money; told them to call on him when in need, and declared that they, his parents were welcome to his last dollar, and often expressed his intention to take care of them; that the said Morris S. Brooks was a young man about twenty-six years of age at the time of his death, in good health, and was an active, honest, and diligent fireman with more than ordinary intelligence and interest in his work and had and possessed a strong desire to earn advancement and increase his capacity for making money to assist his parents; that said Morris S. Brooks was a young man of excellent habits, saving and economical in his disposition, and at the time of his death capable of earning and was earning about $150.00 per month; that this plaintiff and her husband, A. J. Brooks, are aged persons, to wit, upwards of sixty years of age and have not sufficient means of their own to support themselves during their lives and that each is in poor health and unable to earn money or otherwise accumulate money to carry them through their declining years and old age; that the plaintiff brings this action as the personal representative of the said Morris S. Brooks, deceased, for the benefit of N. C. Brooks, plaintiff, and the said A. J. Brooks, his parents, and that by reason of the wrongs and injuries hereinbefore stated, the plaintiff sueing for N. C. Brooks and A. J. Brooks, parents of Morris S. Brooks, deceased, and the said N. C. Brooks and A. J. Brooks have been damaged in the sum of $25,000.

Wherefore plaintiff prays judgment against the defendant for the sum of $25,000 and for the costs of this action, and for such other relief as she may be entitled to upon a hearing hereof.

W. M. SMITH,
TORRANCE & BLOSS,
Attorneys for Plaintiff.

The demurrer above referred to is heretofore copied on page 7 of this record.

And on another day of said term of said court, continued and held, to wit, on the 31st day of December, 1906, came the plaintiff, by W. H. Smith, her attorney. Came also the defendant, by A. P. Humphrey, its attorney. The court being now fully advised of the defendant's demurrer to the plaintiff's petition herein, delivered an opinion in writing, which is ordered to be filed, and in accordance therewith it is ordered by the court that said demurrer be, and the same is hereby, sustained, to which the plaintiff excepts. It is further ordered that leave is given the plaintiff to amend her petition herein if she is so advised.

16 United States Circuit Court, Western District of Kentucky.

N. C. BROOKS, ADMINISTRATRIX,
vs.
THE SOUTHERN PACIFIC COMPANY.

Opinion.

Morris S. Brooks, a citizen and resident of Kansas, but employed by the defendant as a fireman on one of its locomotives engaged in interstate commerce in the State of Nevada, having been killed in the latter State on June 16, 1906, by the negligence of certain of his fellow-servants in the same occupation, the plaintiff, N. C. Brooks, his mother, was qualified as his personal representative by the Probate Court of Cowley County, Kansas. Thereafter she, alleging herself to be a citizen of Kansas, instituted this action against the defendant, a citizen of Kentucky, seeking to recover $25,000 in damages for the injury to her son, resulting from the alleged negligence of the defendant's employes. The defendant filed a general demurrer to the petition, and the questions thus raised have been elaborately argued.

The Attorney-General of the United States, conceiving, we suppose, that the United States had some interest in the case, sent one of his special assistants to intervene on behalf of the Government. When the application was made it was objected by the defendant that this was a litigation strictly inter partes, with which the United States had no concern. The court found it difficult to see how any other conclusion could be reached, and, indeed, in all such cases neither of the parties really interested might desire to be affected by the contentions of any outside person. But, while it is not thought that such a practice should be especially encouraged, inasmuch as there is no statute or law which authorizes or directs the Attorney-General to support by arguments in the courts generally the
17 legislation of Congress where the United States is not a party nor its interests involved in any tangible way, yet the court, desiring light upon the very important questions involved in the case, decided to hear the special assistant of the Attorney-General as a friend of the court; but, as both of the parties in interest in the

litigation might desire to combat his views if regarded as conflicting with the grounds and arguments upon which they respectively might desire to rest the case, the court thought it best that he should speak first, and he did so at length.

Some question was also made as to whether a personal representative qualified in Kansas could sue in any other State without authority from such other State, and some cases would seem to support that contention, but in view of the act of Congress, to which we shall presently allude, and other somewhat obvious considerations, we have concluded that this contention, which was indeed not much pressed, should not at present prevail. Kansas was the domicile of the deceased fireman, and the defendant does not operate its railroad within that State. Being his domicile at the time of his death, that fact, per se, gave jurisdiction to the court there to appoint his administratrix. He was killed in Nevada, and the defendant is a citizen of Kentucky. In neither of those States is it probable that the deceased fireman had any assets to give jurisdiction to the courts of either State for a similar purpose. A mere claim for damages for a tort does not seem to be assets for such purpose. So that from necessity, and in order that the plaintiff may have a remedy which could be enforced against a corporation which did not have a residence in the State of domicile, we are inclined, for the purposes of a suit based on the act of Congress, to treat the plaintiff as the personal representative of Morris S. Brooks within the purview of that act, especially as we think the case ought to be decided upon broader grounds than those which would confine it to the legality of the appointment of the plaintiff.

It was expressly conceded at the hearing by plaintiff's counsel that she must succeed, if at all, upon the provisions of the act of Congress relating to the liability of common carriers to their employes, approved June 11, 1906, which will presently be set out in full. The plaintiff's case, in short, must stand or fall with that act. If it be a valid exercise of legislative power, the plaintiff's right to recover damages is clear if the averments of the petition be true.
18 Otherwise the demurrer must be sustained. The questions involved are, therefore, of very great and possibly far-reaching importance, and have deserved and received our most careful consideration.

The act referred to is as follows:

"An act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employees.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Colum-

bia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employes, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employes, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

"SEC. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. All questions of negligence and contributory negligence shall be for the jury.

"SEC. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employe, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employe: Provided, however, that upon the trial of such action against any common carrier the defendant
19 may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employe, or, in case of his death, to his personal representative.

"SEC. 4. That no action shall be maintained under this act, unless commenced within one year from the time the cause of action accrued.

"SEC. 5. That nothing in this act shall be held to limit the duty of common carriers by railroads or impair the rights of their employes under the safety-appliance act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three."

To determine the questions before us, it is important clearly to understand the exact scope and purport of the act. While the title is not controlling in the construction of an act of Congress, it may aid us in our investigation to note that the title in this instance labels the act as one relating to the liability of certain common carriers to their employes. This label, so to speak, quite accurately describes the contents of the measure, for it in fact does nothing more than fix the liability of certain common carriers to their employes. The first section provides that every common carrier engaged in trade or commerce between the several States shall be liable to any of its employes, or, in the case of his death, to his personal representative for the benefit of his widow, etc., for all damages which may result from the negligence of any of its officers, agents, or employes, or by reason

of any defect or insufficiency due to its negligence in respect to its cars, etc. This section obviously abrogates the familiar doctrine of the courts, founded upon considerations of public policy, that an employe when entering the service of his employer is conclusively presumed to have assumed the ordinary risks of the occupation, including those which may result from the negligence of his fellow-servants. The second section imposes, in complicated form, the doctrine of comparative negligence, so as greatly to modify the ordinary judicial rule that a person can not recover if, by his own negligence, he so contributed to his own injury as that without it that injury would not have occurred. Other sections further change existing laws in respects which have no present bearing on the discussion.

If the act did no more than change the law as administered
20 in the courts of the United States and so as to control only cases pending therein, the right to do so by appropriate legislation might not be open to question, as mere judicial rules founded on the common law or upon considerations of public policy, but having all the force of law, are no more sacred than legislative enactments, which may be altered or repealed at the will of Congress; but its title and first section elaborately and unmistakably show that the scope of the act in question is immeasurably different, and Congress obviously intended it to be so. If the act be valid as a regulation of commerce, which is all that was claimed for it at the argument, and doubtless all that can fairly be claimed for it in any event, it is the supreme law of the land of general application, and as such is binding upon all courts—State and Federal—and fixes imperative rules by which all of them must hereafter be governed.

It is manifest that legislation of that scope, namely, legislation designed to regulate commerce, must find its warrant in article 1, section 8 of the Constitution of the United States, which, for the purposes of this discussion, is in this language: "The Congress shall have power," among other things, "* * * to regulate commerce with foreign nations and among the several States and with the Indian tribes," and "* * * to make all laws which shall be necessary and proper for carrying into effect the foregoing powers."

As we recently had occasion to point out, the construction of the last of these clauses is governed by the rule laid down in the opinion of the court in McCulloch v. Maryland, 4 Wheaton, 421, which, while showing that constitutional limits are not to be transcended, also holds that in regulating commerce the National Legislature must have large discretion in carrying into execution the high powers conferred upon it in the manner most beneficial to the people, and if the end be legitimate and the act within the scope of the Constitution, then that all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but which consist with the letter and spirit of the Constitution, are constitutional.

Upon the legislation now under discussion two questions arise, each of them of vital importance. The first is, whether the subject-matter of the act, namely, the creation and enforcement of liabilities

growing out of the negligence of certain common carriers to their employes, is a regulation of commerce among the States within the meaning of that phrase in the Constitution; and the second is,
21 whether the act, if it does regulate commerce among the States, does not also regulate commerce that is exclusively within the several States, and whether the latter is not so inseparably combined with the former as to condemn the whole act as unwarranted by the Constitution. In the opinion delivered in the case of United States v. Scott (148 Fed.), we recently had occasion to discuss similar questions, and need not repeat now much of what was said then, though we have industriously reexamined the whole subject.

Having found that the act of June 11, 1906, is not limited and manifestly was not intended to be limited to the purpose of changing certain rules of law administered in the Federal tribunals in suits for damages pending therein, but was designed to operate as a regulation of commerce under the clause of the Constitution referred to, we come to the first of the questions, viz: Whether the act can fairly and properly be considered as a regulation of commerce in any sense. Obviously the first inquiry is whether an act, strictly limited as this is to fixing liability to their employes of such common carriers as are engaged in interstate commerce, is a regulation of such commerce—that is to say, does it prescribe a rule for carrying on commercial intercourse among the States, which seems to be the essential requisite in such legislation? The solution of that question may, and probably must, depend upon whether a rule of liability for injuries is or by any reasonable probability can be regarded as commerce or a rule for carrying it on in any sense whatever, either as the word is used in the Constitution or otherwise. Commerce has been described by the Supreme Court in many cases, from 1824, in Gibbons v. Ogden, 9 Wheaton, 189, down to very recent times, but it has never been deemed desirable to give the word any hard and fast definition in view of the great changes constantly occurring in the business affairs of the world.

It may help us to note that Webster defines commerce to be "the exchange or buying and selling of commodities, especially the exchange of merchandise on a large scale between different places or communities; extended trade or traffic." In Gibbons v. Ogden it was said that commerce is more than traffic, it is intercourse, and that it is regulated by prescribing rules for carrying on that intercourse. In many cases it has been held by the Supreme Court that commerce includes navigation and transportation of both persons and
22 property, as well as traffic generally, and all the cases agree in treating the word "commerce" as one of large and extensive meaning. In Hopkins v. United States, 171 U. S., at page 597, speaking through Mr. Justice Peckham, the court said:

"Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know, from the cases decided in this court, that it is a

term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different States; and the power to regulate it embraces all the instruments by which such commerce may be conducted. Welton v. Missouri, 91 U. S., 275; Mobile County v. Kimball, 102 U. S., 691; Gloucester Ferry Company v. Pennsylvania, 114 U. S., 196; Hooper v. California, 155 U. S., 648, 653; United States v. E. C. Knight Company, 156 U. S., 1."

And the instruments by which commerce may be carried on necessarily vary as improvement and invention expand the opportunities and facilities therefor. Many cases might be cited showing the various applications of the word "commerce" to existing instrumentalities of traffic, but it is not deemed necessary to elaborate that phase of the discussion. Certainly section 8, article 1, of the Constitution gives Congress the power to regulate commerce among the States, and, as we have seen, it may do this by any law which is appropriate and plainly adapted to that end and which is within the scope and consistent with the letter and spirit of the Constitution—conditions of great moment which can not be overlooked. While the courts would be exceedingly slow to inquire into the mere appropriateness of legislation, they can not decline the duty of inquiring whether legislation is within the constitutional power of Congress when a proper case demands the investigation; and a most patient consideration of the question in this instance has led us to the conclusion—we think to the inevitable conclusion—that the act of June 11, 1906, only creates and imposes a liability upon certain common carriers to their employes, and in no way prescribes rules for carrying on traffic or commerce among the States, and consequently in no way regulates such commerce. If the operation of the act could in any wise affect commerce among the States it would do so in a manner so
23 remote, incidental, and contingent as in no proper sense to afford a factor of any value in determining the question now in contention. With what the Supreme Court has said in many cases before us, and with an open Constitution to control, we should be trifling with important things if we gave force to any other conclusion. Indeed, it may be said that it is obvious that Congress, in the act referred to, had in contemplation no more than the creation of the liability mentioned, and it would be a most strained construction to hold that it included anything broader than that. Creating new liabilities growing out of the relations of master and servant on the one hand and regulating commerce on the other are two things so entirely different that confusion of the judicial mind upon them is hardly to be expected under normal conditions. In the opinion of the court the act does not regulate commerce among the States. While Congress seems to have desired in this instance to exert the power given by the Constitution for that purpose, it, in fact, regulated something which is not commerce at all.

2. But if we are in error in the conclusion that the act when properly considered does not "regulate commerce among the States," there yet remains to be considered the second of the questions above stated, namely, whether the act, if it does regulate commerce among the States, does not also equally regulate commerce that is exclusively within the several States and thereby embrace not only matters which are constitutional, but also those which are unconstitutional in a way to make the two indivisible and to bring the entire act under condemnation when subjected to well-established rules of construction.

But before entering upon a discussion of this last question it may not be inappropriate to recall the trite, but transcendently important, proposition that while the powers given to Congress are to be fairly and even liberally construed, especially in respect to the commerce clause of the Constitution, yet those powers have a limit beyond which Congress can not legitimately go. We should not grow restive under the restrictions and limitations of that great instrument, for the stability of our institutions largely depends upon their enforcement, and so great is our respect for the legislative branch of the Government that we shall always regard any overstepping of those bounds by that body to have been an inadvertence. This the courts can and should correct when they come to look more critically into the subject than Congress had probably had the opportunity to do.

In the Trade Mark Cases, 100 U. S., 82, the Supreme Court
24 had before it in concrete form the second question to which we have just referred. The following syllabi prefixed to the report of that case clearly and accurately summarize the points decided and present at once and in succinct form the propositions of law upon which the question now under discussion must turn:

"If an act of Congress can in any case be extended, as a regulation of commerce, to trade-marks, it must be limited to their use in 'commerce with foreign nations, and among the several States, and with the Indian tribes.'

"The legislation of Congress in regard to trade-marks is not, in its terms or essential character, a regulation thus limited, but in its language embraces, and was intended to embrace, all commerce, including that between citizens of the same State.

"That legislation is void for want of constitutional authority, inasmuch as it is so framed that its provisions are applicable to all commerce, and can not be confined to that which is subject to the control of Congress."

Sutherland, in his work on Statutory Construction (section 169), says:

"In this country legislative bodies have not an unlimited power of legislation. Constitutions exist which contain the supreme law. Statutes which contravene their provisions are void. Courts have power, and they are charged with the judicial duty, to support the constitutions under which they act against legislative encroachments. They will declare void acts which conflict with paramount laws."

And in section 170 he states the general principle applicable to this case, as follows:

"It may be laid down generally as a sound proposition that one part of a statute can not be declared void and leave any other part in force, unless the statute is so composite, consisting of such separable parts that, when the void part is eliminated, another living, tangible part remains, capable by its own terms of being carried into effect, consistently with the intent of the legislature which enacted it in connection with the void part. If it is obvious that the legislature did not intend that any part should have effect unless the whole, including the part held void, should operate, then holding a part void invalidates the entire statute."

The text of the author is supported by many cases, State and Federal, cited in his notes.

25 The general doctrine has been reannounced in numerous cases by the Supreme Court. In Baldwin v. Franks, 120 U. S., 686, etseq., it was much emphasized, as it also had been in previous cases. And that there is no disposition to change this thoroughly established rule was unmistakably manifested when the Supreme Court, on the day on which this case was argued, in Illinois Central R. R. v. McKendree, held that an order of the Secretary of Agriculture regulating quarantine was void because too broad in its scope, and, speaking through Mr. Justice Day, said:

"The terms of order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. It would, therefore, include cattle transported within the State of Tennessee from the south of the line as well as those from outside that State; there is no exception in the order, and in terms it includes all cattle transported from the south of the line whether within or without the State of Tennessee. It is urged by the Government that it was not the intention of the Secretary to make provision for intrastate commerce, as the recital of the order shows an intention to adopt the State line, when the State by its legislature has passed the necessary laws to enforce the same completely and strictly. But the order in terms applies alike to interstate and intrastate commerce. A party prosecuted for violating this order would be within its terms if the cattle were brought from the south of the line to a point north of the line within the State of Tennessee. It is true the Secretary recites that legislation has been passed by the State of Tennessee to enforce the quarantine line, but he does not limit the order to interstate commerce coming from the south of the line, and, as we have said, the order in terms covers it. We do not say that the State line might not be adopted in a proper case, in the exercise of Federal authority, if limited in its effect to interstate commerce coming from below the line, but that is not the present order, and we must deal with it as we find it. Nor have we the power to so limit the Secretary's order as to make it apply only to interstate commerce, which it is urged is all that is here involved. For aught that appears upon the face of the order, the Secretary intended it to apply to all commerce, and whether

he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single and indivisible."

26 After quoting from United States v. Reese, 92 U. S., 221, and from the Trade-Mark Cases, 100 U. S., 99, the court added:

"We think these principles apply to the case at bar, and that this order of the Secretary, undertaking to make a stringent regulation with highly penal consequences, is single in character, and includes commerce wholly within the State, thereby exceeding any authority which Congress intended to confer upon him by the act in question, if the same is a valid enactment."

With this perfectly plain rule before us, we must, by its requirements, test the act of June 11, 1906, which, we repeat, provides that "every" common carrier engaged in interstate commerce shall be liable to "any" of its employes, or, in case of his death, to his personal representative, for "all" damages which may result from the negligence of "any" of its officers, agents, or employes, or by reason of "any" defect or insufficiency due to its negligence in its cars, etc. Language could hardly be broader or more comprehensive in its scope. Argument was made attempting to show that the language should be construed to create a liability only where the employe was at the time of the injury engaged upon interstate commerce; but the words of the statute are plain and unambiguous, and if they admit of any construction it clearly does not admit of the one contended for. On the contrary, as already emphasized, that language expressly is that every such common carrier shall be liable to any of its employes for all damages which may result from the negligence of any of its employes, or by reason of any defect in cars, etc. The rule is elementary that where language is plain it admits of no construction, but must be taken in its obvious signification and to mean what is says.

The act in question was attempted to be likened to that of March 2, 1893, usually known as the safety-appliance act, but in all the respects with which we are concerned the provisions of the latter act are wholly different from those of the former, as will at once be seen by comparing section 1 of the safety-appliance act with section 1 of the act of June 11, 1906. Section 1 of the former provides that it "shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic which is not equipped, etc., . . . or to run any train in such traffic after said date that

27 has not a sufficient number of cars in it so equipped," etc. This comparison at once makes manifest the difference between the two acts. No doubt it is for this reason that small question has ever been made as to the constitutionality of the safety-appliance act.

Furthermore, the act of June 11, 1906, obviously includes all of the employes of every common carrier which is engaged in inter-

state commerce, whether the employe is so engaged or not. If the common carrier be itself engaged in interstate commerce as part of its business, it is wholly immaterial, under the terms of the act, whether an injured employe was ever so engaged. Take as an illustration near home: The Louisville & Nashville Railroad Company has an important branch which only extends from Louisville, on the northern border of the State, to Lexington, near its center, and the business of that branch is necessarily for the most part confined to commerce entirely in Kentucky. That company also has very large shops in Louisville, at which it employs a very great number of servants. Its general offices are here, in which are many clerks. The duties of most of these employes, namely, those in its shops and general offices, can not possibly have any direct relation to interstate commerce, and those of many of them can have no relation to interstate commerce at all. Yet the enactment that every common carrier engaged in interstate commerce shall be liable to any of its employes for all damages resulting from the negligence of any of its officers, agents, etc., embraces all of the employes of that common carrier, whether or not those employes have anything to do with interstate commerce. So with a common carrier who might use horses and wagons in a general business which might embrace the carriage of merchandise, say between St. Louis, Mo., and East St. Louis, Ill., or between Louisville, Ky., and New Albany, Ind. Now, although small proportions of the carrier's business might be interstate, and much the greater part be confined locally to St. Louis in one instance or to Louisville in the other, yet, as those common carriers were respectively and to some extent actually engaged in interstate commerce, the act of June 11, 1906, would impose upon them the liability it creates, even though one of their employes might be injured in conducting the purely local business of the carrier and whether or not he ever had anything to do with interstate commerce.

28 An intelligent consideration of the authorities will lead, we think necessarily, to the conclusions, first, that even if the act regulates commerce in any possible constitutional sense it is too broad and applies not only to interstate commerce, but also to that which is entirely within the States respectively; and second, that the provisions of the act in these respects are single and altogether inseparable the one from the other.

Even if some part of the act might be sustained if it stood alone, yet as all its parts are inseparably connected all must fall if any should do so. The applicable rule is well established, and we do not have to go far for the reason upon which that rule is based. It is this: It can not be presumed that Congress, when it so joined them together, meant to pass or would have passed either of them separately. In its opinion, in Baldwin v. Franks, 120 U. S., at page 687, the court, quoting from its opinion in the Trade-Mark Cases, said:

"'While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the

court may enforce the valid part, where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body.' And again, further on, after citing United States v. Reese, and quoting from the opinion in that case, it was said, p. 99: 'If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under State law.'

"The same question was also considered and the former decisions approved in United States v. Harris, supra; and in the Virginia Coupon Cases, 114 U. S., 269, 305, it was said that 'to hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact.'"

This rule is also clearly stated in the opinion in Illinois
29 Central R. R. Co. v. McKendree, and the subject has often been so treated by the State courts in cases which are collected in Sutherland in the work referred to in sections 169 to 174, inclusive.

Furthermore, it may be remarked that in several instances the Supreme Court has held that city ordinances imposing taxes on telegraph companies were void or not void as they differentiated a tax on interstate business from one on State or local business alone. See Leloup v. Port of Mobile, 127 U. S., 640, and cases cited. In short, the Constitution of the United States, which firmly fixes our form of government, gives Congress the power to regulate interstate commerce, but leaves to the States respectively the exclusive power of regulating that commerce which is carried on altogether within the limits of a State. Here the Congressional enactment attempts, through the same provisions, to regulate commerce generally, including both interstate commerce and that which is purely local to the States. It consequently embraces matters which are within and matters which are not within the reach of Congressional power, and as the matters which are within Congressional competency are inseparably combined with those which are not, no part of the act can be sustained.

Not because they were difficult, but because of widespread interest in the questions involved in this case, we have stated, probably with more than necessary fullness, the grounds of our decision, which we rest upon the two propositions discussed, and thereupon hold that the act of June 11, 1906, is invalid.

3. This conclusion, however, may possibly leave another question open, which is this: With the act eliminated, is a cause of action otherwise disclosed by the plaintiff's petition in this action by a citi-

zen of Kansas against a citizen of Kentucky? The cause of action arose in Nevada. At the common law of course no action for damages would lie in favor of an administrator where the injury had resulted in death. Such right always must depend upon some statutory enactment. The legislation of Nevada upon the subject is found in the act of March 24, 1905, amending section 3983 of the compiled laws of that State. The right to sue given by that statute to the personal representative seems to be made to depend upon the strict condition that the action shall be brought in Nevada and not elsewhere. This condition renders it more than probable that the right of action given by the statute is not transitory, because the right is given only where the suit is brought in Nevada. But, assuming that the action may be considered transitory in the general sense, we are then confronted with decisions like those in Noonan v. Bradley, 9 Wallace, 400, and Maysville, etc., Co. v. Marvin, 59 Fed., 91, which rule that a personal representative qualified in one State can not sue in another State without the latter's authorization. In the last-named case it was distinctly held by the Circuit Court of Appeals of this circuit that a claim for damages for tort will not support an exercise of the power given under sections 3878 and 3879 of the Kentucky
30 Statutes, which authorize the county court to empower a foreign administrator to sue for "debts" due the decedent. This decision was in accord with the doctrine of the Kentucky Court of Appeals in construing the statutes of that State.

And, of course, if the act is eliminated, it is obvious that the petition is insufficient, because on its face it shows that the injuries of the deceased resulted from the negligence of his fellow servants.

So that from every point of view the judgment of the court must be that the plaintiff has not manifested by the averments of her petition any right to recover in this action. The demurrer is, therefore, sustained, but, as required by the Kentucky Code, she will be given leave to amend her pleading, if so advised.

WALTER EVANS, *Judge.*

DECEMBER 31, 1906.

30½ The opinion above referred to is as follows, to wit:

31 And on another day of said term of said court, continued and held to wit, on the 12th day of January, A. D. 1907, came the plaintiff, by W. M. Smith, her attorney, and announced to the court that she declined to plead further herein. It is therefore ordered by the court that the plaintiff's petition be, and the same is hereby, dismissed, and that the defendant recover of the plaintiff its costs herein expended, to all of which the plaintiff excepts.

And on another day of said term of said court, continued and held to wit, on the 25th day of January, A. D. 1907, came the plaintiff, by W. M. Smith, Torrance & Bloss, and George Du Relle, her attorneys, and presented to the court her petition for a writ of error and assignment of errors, and, on consideration whereof, it is now ordered that said petition and assignment of errors be filed and a

writ of error be, and is hereby, allowed, to have reviewed in the Supreme Court of the United States, the judgment and proceedings heretofore entered and had herein upon, the plaintiff giving bond according to law in the sum of two hundred dollars.

And thereupon plaintiff tendered a bond in the sum of two hundred dollars, with the American Surety Company, of New York, as surety; which bond is now ordered filed and is hereby approved.

The petition for writ of error above referred to is as follows:

United States Circuit Court for the Sixth Circuit and Western District of Kentucky.

N. C. BROOKS, ADMINISTRATRIX OF MORRIS S. BROOKS, deceased, plaintiff,
vs.
SOUTHERN PACIFIC COMPANY, DEFENDANT.

Petition for writ of error.

Now comes N. C. Brooks, administratrix of the estate of Morris S. Brooks, deceased, plaintiff herein, by W. M. Smith, Torrance & Bloss, and George Du Relle, her attorneys, and says that on the twelfth day of January, A. D. 1907, this court entered judgment herein in favor of the defendant against said plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff, all of
32 which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause duly authenticated may be sent to said United States Supreme Court.

W. M. SMITH, TORRANCE & BLOSS, GEORGE DU RELLE,
Attorneys for Plaintiff in Error.

The assignment of errors above referred to is as follows:

United States Circuit Court for the Sixth Circuit and Western District of Kentucky.

N. C. BROOKS, ADMINISTRATOR OF MORRIS S. BROOKS, deceased, plaintiff in error,
vs.
SOUTHERN PACIFIC COMPANY, DEFENDANT IN ERROR.

Assignment of errors.

Afterwards, to wit, on the 25th day of January, A. D. 1907, comes N. C. Brooks, administratrix of the estate of Morris S. Brooks, deceased, plaintiff in error, by W. M. Smith, Torrance & Bliss, and

George Du Relle, her attorneys, and says that in the record of the proceedings in the above-entitled cause in the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky, there is manifest error in this, to wit:

I. In adjudging that the defendant's demurrer be sustained to the plaintiff's petition herein, and in dismissing said petition and in adjudging that the defendant recover of plaintiff its costs in said cause expended and have execution.

II. In finding and adjudging that plaintiff in error was not entitled to recover upon her cause of action asserted in said cause.

III. In finding and adjudging that the act of the Congress of the United States, approved June 11, 1906, and entitled "An act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their
33 employees" is in violation of the Constitution of the United States of America and void.

WM. M. SMITH.
TORRANCE & BLOSS.
GEORGE DU RELLE.
Counsel for Plaintiff in Error.

The appeal bond above referred to is as follows:

Circuit court of the United States, western district of Kentucky.

N. C. BROOKS, ADMINISTRATRIX OF Morris S. Brooks, deceased,
vs.
SOUTHERN PACIFIC COMPANY.

Know all men by these presents that we, N. C. Brooks, administratrix of Morris S. Brooks, deceased, as principal, American Surety Company of New York, as surety, are held and firmly bound unto Southern Pacific Company in the sum of two hundred dollars, to be paid to the said Southern Pacific Company, executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated this 25th day of January, A. D. 1907.

Whereas the above-named N. C. Brooks, administratrix of Morris S. Brooks, deceased, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the Circuit Court of the United States for the Western District of Kentucky, at Louisville;

Now, therefore, the condition of this obligation is such that if the above-named N. C. Brooks, administratrix of Morris S. Brooks, deceased, shall prosecute her said writ of error to effect, and answer

all damages and costs, if she shall fail to make good her plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

N. C. BROOKS, *Admr. of Morris S. Brooks*, [L. S.]
By W. M. SMITH, *Atty.*
AMERICAN SURETY COMPANY OF NEW YORK,
[SEAL.] By SAMUEL K. BLAND, [L. S.]
Resident Vice-President.

34 JOHN G. LEWIS,
Resident Asst. Secretary.

Sealed and delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court,
Western District of Kentucky.

Approved January 25th, 1907.

WALTER EVANS, *Judge.*

35 WESTERN DISTRICT OF KENTUCKY, *ss:*

I, A. G. Ronald, clerk of the Circuit Court of the United States for the Western District of Kentucky, at Louisville, do hereby certify that the foregoing pages contain a true and correct transcript of the record and proceedings had in the case mentioned in the caption hereof as appears from the files and records of my said office.

Witness my hand and seal of said court this 26th day of January, 1907.

[SEAL.] A. G. RONALD, *Clerk,*
By HENRY F. CASSIN, *Deputy Clerk.*

(Indorsement on cover:) File No. 20,559. W. Kentucky C. C. U. S. Term No. 594. N. C. Brooks, administratrix of Morris S. Brooks, deceased, plaintiff in error, vs. Southern Pacific Company. Filed January 4th, 1907. File No. 20,559.

O

No. [redacted] 222.

IN THE

Supreme Court of the United States.

FEBRUARY 4, 1907.

N. C. BROOKS, ADMINISTRATRIX OF MORRIS S. BROOKS, DECEASED, - - - - - *Plaintiff*,

vs.

THE SOUTHERN PACIFIC COMPANY, - - - *Defendant.*

MOTION TO ADVANCE.

Now comes the plaintiff, N. C. Brooks, Administratrix of Morris S. Brooks, deceased, by her Attorneys, W. M. Smith, Torrance & Bloss, and George Durelle, moves the Court to advance this case and set same for as early date as it may seem convenient to this Honorable Court to hear same, because said case involves a new question in the construction of the Act of June 11, 1906, relative to the Master and Servants Law, and this case is asked to be advanced upon the docket of this Honorable Court.

W. M. SMITH,
TORRANCE & BLOSS,
GEORGE DURELLE,
Attorneys for Plaintiff.

Formal service of notice on above motion is waived.

Attorney for the Southern Pacific Company.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 594.

N. C. BROOKS, ADMINISTRATRIX, OF MORRIS S. BROOKS, DECEASED, PLAINTIFF IN ERROR,

vs

SOUTHERN PACIFIC COMPANY, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

This action was brought in the Circuit Court of the United States for the Western District of Kentucky, Sep-

tember 29, 1906, against the defendant, a citizen and inhabitant of the Western District of that State, to recover damages for the wrongful death of Morris S. Brooks.

The deceased was a fireman on one of the defendant's through freight trains, east bound from Sparks, Nevada, on the afternoon of June 16, 1906, and was killed without any fault on his part in a rear-end collison at Gilpin, a small station, a few miles east of Sparks. The collision was caused by the negligence of a member of the crew of the preceeding train, one of the defendant's through freights, which, on the afternoon in question, stopped at Gilpin: The negligence was in failing to flag properly the following train on which the deceased was employed. Both trains were engaged wholly in inter-state commerce.

The plaintiff is the mother of the deceased, and the adminstratrix of his estate, duly appointed and qualified by the Probate Court of Cowley County, Kansas. She is a resident of that county and state, as was her son before his death. She was also duly authorized by the Jefferson County Court, State of Kentucky, to prosecute this action in the State of Kentucky. (Printed Record, page 8). As the personal representative of the deceased, she sued for the benefit of herself and husband, the father of the deceased, who were dependant upon him for support.

She bases her right to recover on the Act of Congress of June 11, 1906. (34 Statutes 232 and 233,) known as the Federal Employers' Liability Act.

This Act appears in full, on pages 14 and 15 of the printed Record.

In the trial court, it was conceded by all parties, that if this Act be within the powers of Congress, the plaintiff stated a cause of action in her petition. (Printed Record, page 14.)

In the opinion filed herein and printed on pages 13 to 24, of the printed record, the trial Court held the Act of June 11, 1906, unconstitutional, and sustained a demurrer to the petition of the plaintiff on the ground that it did not state facts such as to constitute a cause of action against the defendant. The plaintiff declined to plead further, and her suit was dismissed. (printed record, page 24.) She prosecutes this action in this Court by writ of error, to secure the reversal of the judgment against her in the lower Court.

SPECIFICATIONS OF ERROR.

First. In adjudging that the defendant's demurrer be sustained to the plaintiff's petition herein, and dismissing said petition,and in adjudging that the defendant recover of plaintiff its costs in said cause expanded and have execution.

Second. In finding and adjudging that plaintiff in error was not entitled to recover upon her cause of action asserted in said cause.

Third. In finding and adjudging that the Act of Congress of the United States, approved June 11, 1906, and entitled "An Act relating to liability of common carriers in the district of Columbia and territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employees" is in violation of the constitution of the United States of America and void.

BRIEF OF ARGUMENT.

We will consider all the errors specified herein under the general question,

IS THE "EMPLOYERS' LIABILITY ACT" OF JUNE 11, 1906, (34 STAT. 232) CONSTITUTIONAL?

(I) Is this act a regulation of interstate commerce? and (II) is the act void because it is framed so that its provisions are applicable alike to all commerce, including that between citizens of the same State, and cannot be confined to that which is subject to the control of Congress?

1. The act of June 11, 1906 is a regulation of interstate commerce.

Article 1, Section 8, Constitution of the United States, provides that:

"The congress shall have power * * * * to regulate commerce with foreign nations, among the several states, and with the Indian tribe."

8 Fed. Stat. Annot. 363.

And also:

" * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers; * * * * ."

8 Fed. Stat. Annot. 674.

A. The Extent of the Power of Congress.

The constitution is one of enumeration and not of definition; the power of congress over interstate commerce is

as extensive as that of the legislative body of any sovereign state or nation over its commerce.

Gibbons v Ogden, 9 Wheat. 187.

The power to regulate commerce extends to all the means, appliances, facilities, and instrumentalities of commerce.

Welton v Missouri, 91 U. S. 275, 280.

Northern Securities Company v United States, 193 U. S. 197, 344.

Stockton v Baltimore & N. Y. R Co., 32 Fed. Rep. 9, 16.

And the power of Congress to regulate commerce extends to persons as well as property.

Linn Sing v Washburn, 20 Cal. 543.

"Head Money Cases," 18 Fed. Rep. 135.

Memphis and Little Rock Ry. Co. v Nolan etc. 14 Fed. Rep. 532.

In Gibbon v Ogden, supra, at page 195, it is held that the power of congress under the commerce clause extends "to those internal concerns which effect the States generally."

Under it power to regulate commerce Congress has regulated the method of recording bills of sale and mortgages, and the rights and duties of seamen and the limitation of the responsibility of ship owners for the negligence and mismanagement of their crews.

A statute limitating a vessel owner's liability is valid.

The Lottawana, 21 Wall. (U. S.) 577

Providence etc. Steamship Co. v Hill Mfg. Co. 109 U. S. 589.

In passing upon an employers' liability act of the State of Ohio, and holding this act to be within the power of the legislature of that State, Mr. Justice Harlan, writing the opinion of the Circuit Court of Appeals, says:

"Undoubtedly the whole subject of the liability of interstate railroad companies for the negligence of those in their service may be covered by national legislation enacted by Congress under its power to regulate commerce among the States. But as Congress has not dealt with that subject, it was competent for Ohio to declare that an employe of any railroad corporation doing business here, including those engaged in commerce among the States, shall be deemed, in respect to his acts within the State, the superior, not the fellow servant, of other employees under his control. If the effect of the Ohio statute be, as it undoubtedly is, to impose upon such corporations, in particular circumstances, a liability for injuries received by some of its employees which would not otherwise rest upon them according to the principles of general law, that fact does not release the Federal Court from its obligations to enforce the enactments of the State."

Pierce v Van Dusen, 78 Fed Rep. 700.

State acts of this character have been held constitutional, as within the police powers of the State.

Missouri Pacific R. Co. v Mackey, 33 Kan. 298
127. U. S. 205.
Chicago etc. R. Co. v Zernecker, 59 Nebr. 689.
55 L. R. A. 610.

But the State may enact certain legislation for a purpose that is lawful, as police or quarantine legislation while Congress may enact the same measures for the purpose of regulating commerce or as war regulation.

Gibbons v Ogden, supra.

We think our position is forecasted with reference to the act in question by Chicago, Milwaukee etc., R. Co. v Solon, 169 U. S. 133, 137, where in upholding a State statute denying to common carriers a right to limit their common law liability the Court said:

"The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, and although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits."

See also Freund, Police Powers, (1904) at page 66.

Houston & T. C. R. Co. v Mayes, 201 U. S. 321, 26 Sup. Ct. Rep. 491.

And Cooley, Constitutional Limitations (7 ed.) at page 856 says:

"The line of distinction between that which constitutes an interference with commerce, and that which is a mere police regulation, is sometimes exceedingly dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and that to whatever extent ground shall be covered by those directions, the exercise of the State power is excluded. Congress may establish police regulations, as well as the States; confining their operations to the subject over which it is given control by the Constitution."

Judge Cooley's views, as above expressed, are quoted and approved in Gloucester Ferry Co. v Pennsylvania, 114 U. S. 196, 215.

See also Champion v Ames (Lottery Cases) 188 U. S. 321.

And for the purpose of regulating commerce Congress can exercise the power of eminent domain.

Luxton v North River Bridge Company, 153, U. S. 525.

By the liability acts which apply only to railroads and which are justified by the hazardous character of that kind of work (Missouri Pacific v Mackey, supra) the State does not seek to impose a burden on interstate commerce, but congress by the act of June 11, 1906, places an additional burden on interstate common carriers and thus on interstate commerce. The view that the new liability of the common carrier is a burden on interstate commerce brings the act clearly within the commerce clause of the constitution.

Hall v De Cuir, 95 U. S. 485, 488.

See also message of President Roosevelt, December 5, 1906.

B. Wherein the Federal Employers' Liability act is a regulation of interstate commerce.

1. It places the cost of certain classes of injuries to employees uniformly upon the interstate common carrier. If each state is allowed to say for itself whether or not the cost is to be borne by the interstate common carrier or by the family of the servant, it is apparent that common carriers passing through certain states with no liability acts will have an unnatural advantage over those not so situated. The Courts themselves have recognized the desirability for uniformity, and in Railroad Company v Baugh 149 U. S. 368, this Court has said:

"The lines of this very plaintiff in error extend into a half dozen or more states, and its trains are largely em-

ployed in interstate commerce As it passes from state to state, must the rights, obligations and duties subsisting between it and its employees change at every state line? If to a train running from Baltimore to Chicago it should, within the limits of Ohio attach a car for a distance only within that state, ought the law controlling the relation of a brakeman on that car to the company to be different from that subsisting between the brakeman on the through cars and the company? * * * . It is obvious that the relations between the company and the employee are not in any sense of the term local in character, but of a general nature."

It is our contention, as we have stated, that the act of June 11, 1906, seeks to place uniformly throughout the States of the Union, one of the natural costs of commerce upon the interstate common carrier. In view of the late tendencies of legislation, it becomes a matter of importance that the costs of commerce be as nearly uniform as possible. If the interstate commerce commission is to have power, under certain circumstances, to establish reasonable rates or to determine that certain rates and classifications are unreasonable, the elements of the costs of commerce must be known, and known before it can be determined whether or not a given rate or classification is reasonable or unreasonable. There ought to be no unnatural elements such as might be created by particular state laws or constructions by state courts placed upon the fellow ser-

vant rule to vary the element of liability for injuries to employees in the general problem of the costs of interstate commerce.

2. The Federal liability act will secure better and safer service. The fellow servant doctrine was based in part on a view that the best service was obtained by placing the cost of certain negligence on the servant.

Priestlyv Fowler, 3 M. & W. 1.

Murray v South Carolina Railroad Company, 1 McMull L. (S. Car.) 385, 36 Am. Dec. 286

Farwell v Boston, etc., Railroad Corportion 38 Am. Dec. 339.

Sullivan v Mississippi, etc., R. Co., 11 Iowa, 421

Union Pacific R. Co v Erickson, 41 Neb. 1.

But in Chicago, etc., R. Co v Ross, 112 U. S. 377, Mr. Justice Field doubted that better service would thus be secured. Congress now takes the view that better service will be secured by the rule of liability established by the Act of June 11.

The Federal liability act of June 11 is similar in its scope to the safety appliance act with title as follows:

"An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheels brakes, and for other purposes."

27 Stat. L. 531, 6 Fed. Stat. Annot. 752.

This act is constitutional.

Kansas City, etc., R. Co. v Flippe, 138 Ala. 487, 35 So. Rep. 457.

It has been construed in

Johnson v Southern Pac. Co., 117 Fed. Rep. 462, 196 U. S. 1.

Chicago, etc., R. Co. v Voelker, 129 Fed. Rep. 526. 116 Fed. Rep. 867.

The form of the rule or statute regulating interstate commerce is within the discretion of Congress. To effect this end of uniformity Congress may use such means as it may deem appropriate and "to undertake to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

McCulloch v Maryland, 4 Wheat. 316, 421, 423.

We do not believe that an act of Congress to be within its power to regulate commerce must, upon its face, expressly prescribe a rule for carrying on commercial intercourse among the states. The rule may be prescribed by implication. It has been considered from the time of the constitutional convention that commerce should be free and safe; that commerce among the states may be free, no state should have an unnatural advantage over other states. Congress must not discriminate between the ports of the several states. It is our contention that a law, which, may reasonably be calculated to further the

freedom, uniformity and safety of commerce, or its instrumentalities, prescribes a rule for carrying on commerce within the scope of the power to regulate commerce among the states.

II. The liability act of June 11, 1906, shows by its title and in the body of the act that it applies to interstate commerce, and it is not framed so that its provisions are applicable alike to all commerce.

Both trains of the defendant, concerned in the collision in which Morris S. Brooks lost his life, as appears from the allegation of the petition, and all those charged with negligence, were, at the time, engaged in interstate commerce. The Court will not broaden the statute by construction to include an employee of an interstate common carrier, who is concerned wholly in that part of the carrier's business which is intra-state, for the purpose of then holding the entire act unconstitutional. It will rather hold in a proper case that such an employee is not within the view of the act.

Kansas v Smiley, 65 Kan. 240, 196 U. S. 447.

State statutes relating to commerce which are in terms so general that interstate as well as intra-state commerce may be included are construed to include only what the legislature might lawfully include in them.

17 A. & E. Enc. of Law (2 Ed) 76.

Louisville, etc., Ry. Co. v Mississippi, 133, U S. 587.

An act will be so construed, if possible, as to avoid conflict with the constitution although such a construction may not be the most obvious or natural one. "The Courts may resort to an implication to sustain a statute, but not to destroy it."

Atlanta Water Works Co. v Consumers Water Co., 44 N. J. Eq. 427, 15 Atl. Rep. 581.

Sutherland, Statutory Construction (2ed) Section 298 Vol. 1 at page 584.

In Opinion of the Justices, 41 N. H. 555, it is said:

'The rule of construction universally adopted is that when a statute may constitutionally operate upon cer- persons, or in certain cases, and was not evidently intended to conflict with the constitution, it is not to be held unconstitutional merely because there may be persons to whom or cases in which, it cannot constitutionally apply; but it is deemed constitutional and to be construed not to apply to the latter persons or cases, on the grounds that Courts are bound to presume that the legislature did not intend to violate the constitution."

In the Trade Mark cases 100 U S. 82, legislation which in no way related to commerce, common carriers, state or interstate, but which was enacted with the view that a trade mark was an invention, discovery or writing within the meaning of the Constitution of the United States, Article 1 Sec. 8, Clause 8, was under consideration. Congress plainly intended the act to apply to all commerce, the attempt to justify the legislation under the commerce

clause was an after thought. The act of June 11, 1906, in distinction from the Trade Mark legislation, by its phraseology plainly indicates under what clause of the Constitution Congress assumed to act.

It is very plain that the rule of construction is that indicated in Opinion of the Justices, supra.

In like manner is the order considered in Illinois Central R. Co. v McKendree, 27 Sup. Ct. Rep. 153, distinguished from the statute under consideration.

The construction of the Liability Act we are contending for here has been given the Safety Appliance Act in Johnson v Southern Pac. Co., 196 U. S. 1. The wording of this act is open to all the objections that counsel urge against the act under consideration. If it is found that the car or engine in a particular case is not engaged as an instrumentality of interstate commerce then the Safety Applance Act will not be enforced.

Johnson v Southern Pacific Co., supra.

But in the case at bar, all the employees and trains concerned were engaged in interstate commerce, and the right of the plaintiff to recover is clearly within the terms of the act under consideration.

The "Fellow servant" rule as followed by the Federal courts is a rule of judicial decision and construction. The act June 11, 1906, changes this rule of determining liability. The power to determine such rules as the Federal Courts shall follow has always been exercised by Con-

gress. It therefore follows that if the provisions of this act are to be enforced in the Federal Courts only, that the act may be upheld upon the foregoing principles.

We therefore contend that the Federal Employers' Liability act of June 11, 1906, is constitutional, and that the judgment in this case should be reversed, and the plaintiff in error given all proper relief.

J. E. TORRANCE,
S. C. BLOSS,
GEO. DURELLE,
W. M. SMITH,

Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 594.

N. C. BROOKS, Administratrix of Morris S. Brooks, Deceased,
Plaintiff in Error,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

The Southern Pacific Company is a corporation created by and organized under the laws of the State of Kentucky.

N. C. Brooks is the administratrix of Morris S. Brooks, having been appointed as such by the Probate Court of Cowley County, State of Kansas, of which state it is alleged her intestate,

Morris S. Brooks, was at the time of his death a citizen, resident and inhabitant (Record, p. 2).

On October 8, 1906, the administratrix filed a suit in the Circuit Court of the United States for the Western District of Kentucky, alleging that her intestate had lost his life while in the service of the railroad company (as the Southern Pacific Company will be hereinafter called) and through the negligence of the agents of that company, the intestate being at the time of his death a fireman upon one of the locomotive engines of the railroad company (Record, p. 2).

Process having been duly served, the railroad company filed a general demurrer to this petition (Record, p. 6).

On another day, December 17, 1906, the plaintiff withdrew certain things from her petition (Record, p. 7) and filed an amended petition (Record, p. 9).

The railroad company withdrew its demurrer to the petition, and then refiled it to the petition as amended.

The amended petition sets out the cause of action fully and may therefore be considered without reference to the original petition (Record, p. 9). It alleges the qualification of the plaintiff as

administratrix of the estate of Morris S. Brooks, showing that this was under and by virtue of an appointment of the Probate Court of Cowley County, State of Kansas, of which state the administratrix alleges she is now and was at that time a citizen, resident and inhabitant; also that the deceased, Morris S. Brooks, was at the time of his death a citizen, resident and inhabitant of said county and state, and had, at the time of his death, personal property in said county; and that said Probate Court of said county and state had jurisdiction, authority and power to grant the letters of administration.

The petition further alleges the due qualification of the administratrix and the filing by her, in the County Court of Jefferson County, Kentucky, of a certain bond.

The petition then alleges that the plaintiff instituted this suit for the benefit of the parents of the said Morris S. Brooks, deceased, he leaving no widow or children, and that the railroad company was at the time of the accident and is now a Kentucky corporation, empowered to engage in the business of a common carrier in the States of California, Nevada, Utah and other States of the United States of America and between said

States; and that the railroad company is now a citizen of the State of Kentucky and an inhabitant and resident of the Western judicial district of said state.

The petition further alleges as follows: "Plaintiff says that the controversy herein is between citizens of different states and the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars, to-wit, twenty-five thousand dollars, and said cause of action arises under the laws of the United States, to-wit, an Act of Congress approved June 11, 1906, entitled 'An Act Relating to the Liability of Common Carriers in the District of Columbia and Territories, and Common Carriers engaged in Commerce between the States and Foreign Nations, to their Employes.'"

The petition then alleges that the railroad company was, on the 16th of June, 1906, operating a line of railroad between and through the States of California, Nevada and Utah, which line of railroad runs through the towns of Sparks and Gilpin in the State of Nevada; that on that day Morris S. Brooks was a fireman on one of the railroad engines "used in hauling commerce, freight and passengers, through and between the

several states aforesaid;" that the railroad company was on that day engaged in the transportation of two of its trains through and between the several states, laden with merchandise which it was transporting from the State of California into, through and between the States of California, Nevada and Utah; that both of these were freight trains, Brooks being fireman on the engine of the following train; that when the first train arrived at the town of Gilpin it stopped on a sidetrack and failed to flag the second train, the result of which was a rear-end collision, in which Brooks was killed.

A general demurrer to this petition was sustained, the Court holding that the Act of Congress upon which the suit was based was unconstitutional (Record, p. 13).

ARGUMENT.

Constitutionality of Employers' Liability Act.

The first matter to be determined is the scope of this Act. This has been so fully dealt with in the brief filed on behalf of the defendant in error in the case of Howard v. Illinois Central

Railroad that only a brief reference thereto will be here given.

It suffices to say that it embraces all carriers, whatever may be their means of transportation, provided, only, that some of their business is between two states.

It further embraces all employees of all such carriers, without regard to the nature of their employment or the scope of their duty.

It also embraces the negligence of all of the employees of the carrier, disregarding the fellow servant doctrine and prohibiting contracts for employment being made which have been heretofore declared to be valid by this Court, as in B. & O. S. W. R. R. v. Voigt, 176 U. S., 498.

A right of action is given in case the injured employee dies. The Act reads: "Shall be liable to any of its employees, or, in the case of his death, to his personal representative, for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him." It is not stated how the recovery is to be divided between the widow and children, or, if none, between the parents, or, if none, between the next of kin dependent upon the deceased person.

It is not competent for Congress to regulate all of the commerce of a common carrier.

We have seen above that this Act determines the liability of the common carrier to all of its employees—those engaged in interstate commerce, those engaged in intrastate commerce, and those not engaged in commerce at all. It applies to the engineer of a through train or of a local train; to a section hand; to a mechanic in the machine shop, and to a clerk in the auditor's office.

A railroad may have its line running through two states. It may have a line in only one State. In case its line is in two states it will carry on not only interstate commerce but intrastate commerce. So, if its line is in only one state it will carry on intrastate commerce and, may, in connection with other carriers, engage in interstate commerce.

C. N. O. & T. P. Ry. v. Int. Com. Com., 162 U. S., 191–2.

There is nothing in the Constitution of the United States which gives to Congress the power to regulate all of the commerce of any individual

or corporation; nor, indeed, to regulate any individual or corporation. The power which Congress has is to regulate commerce. There is a marked distinction between a power to regulate commerce and a power to regulate the affairs of an individual or corporation engaged in interstate commerce.

Congress derives its power to pass this law, if power it has, from Section 3 of Article VIII. of the Constitution. This reads as follows:

> "Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian Tribes."

There have been various statements by this Court in regard to the limit of this power.

Thus Chief Justice MARSHALL, in Gibbons v. Ogden, 9 Wheat., 1, at page 194, said:

> "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. . . The completely internal commerce of a state, then, may be considered as reserved for the state itself."

There is a similar observation in Trade-Mark Cases, 100 U. S., 96, by Mr. Justice MILLER.

The same learned Judge, in Wabash R'y v. Illinois, 118 U. S., 557, 565, said:

> "It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the state, which is not subject to the constitutional provision, and the distinction between commerce among the states and the other class of commerce, between the citizens of a single state, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other."

It may be inconvenient to have two systems of law applicable to the same carrier. In this respect the carrier is not different from every other citizen of the United States. All of us are bound to regulate our conduct by federal legislation as far as the federal government has power, and by state legislation as far as the state has power. It may be inconvenient to have one law apply to a corporation *quoad* its intrastate commerce, and another rule to apply *quoad* its interstate commerce; but this is an inconvenience

which inheres in the dual nature of our government. There can be no doubt that in very many cases this Court has recognized and enforced this duality of control over commerce.

There are various series of cases which are of interest along this line of inquiry.

Thus there are cases holding that a carrier engaged generally in interstate commerce is subject to state control as to its intrastate commerce. In other words, if a carrier generally engaged in interstate commerce, elects also to engage in intrastate commerce, it thereby renders itself amenable to state regulation as to this intrastate commerce. This is well illustrated by the cases of Osborne v. Florida, 164 U. S., 650; Pullman Co. v. Adams, 189 U. S., 420, and Pennsylvania R. R. Co. v. Knight, 192 U. S., 21. These cases hold that an express company doing an interstate business and also electing to do an intrastate business can be required to obtain a license from the state to carry goods from point to point in the state; that a sleeping car company running a line of cars on an interstate journey, electing to accommodate passengers going from a point in a state to another point in the same state, subjects itself to the taxing

power of the state, on this business; and that a company generally engaged in interstate commerce, but electing to provide means by which its patrons can reach its station in New York and can go from its station in New York to hotels and dwelling houses in the city, can be required to submit to taxation by the state upon the franchise of this business.

Another line of cases which is illustrative of this doctrine concerns the right of the states to pass separate coach laws.

There are a number of these cases:

Hall v. DeCuir, 95 U. S., 485.
Louisville Railway Co. v. Mississippi, 133 U. S., 587.
Plessy v. Ferguson, 163 U. S., 537.
Chesapeake & Ohio R'y Co. v. Kentucky, 179 U. S., 388.

In all these cases it was held that it was competent for the state, by its legislation, to separate the races into separate compartments or cars so long as such state regulations were confined to carriage between one point and another in the same state.

There is another series of cases in regard to

state laws requiring railroad trains to stop at certain stations. These are:

Gladson v. Minnesota, 166 U. S., 427, 430.
I. C. R. R. v. Illinois, 163 U. S., 142.
L. S. & M. S. R. R. Co. v. Ohio, 173 U. S., 285.
C. C. C. & St. L. R'y v. Illinois, 177 U. S., 514.

In these cases some state laws were held valid and others invalid, depending upon whether their effect was to regulate strictly intrastate commerce or positively, immediately and directly to affect interstate commerce.

So, also, as to power over rates, the two cases of L. & N. R. R. Co. v. Kentucky, 183 U. S., 503, and L. & N. R. R. Co. v. Eubank, 184 U. S., 27, may be contrasted. In one of these cases it was held that it was competent for the Court of Appeals of Kentucky to enforce the constitutional provision that the charge for a short haul should not be greater than the charge for a long haul, so far as carriage from one point in the state to another point in the state was concerned, and that it was not competent to enforce it so far as carriage from a point out of the state to a point in the state was concerned.

Exactly the same result has followed from an examination by this Court of the Sherman Anti-trust Law. We need only refer to the cases of United States v. E. C. Knight Co., 156 U. S., 1; Hopkins v. United States, 171 U. S., 578, and Addyston Pipe & Steel Co. v. United States, 175 U. S., 211, 212. These cases were determined by an ascertainment of whether the particular contract was a combination in restraint of interstate traffic or simply in restraint of intrastate traffic.

Referring to the right of Congress to legislate as to commerce, and the reserved power of the state to regulate its internal affairs, this Court, speaking through Chief Justice FULLER, said, in United States v. E. C. Knight Co., 156 U. S., 1:

> "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the

> risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

In the last of these cases, Addyston Pipe & Steel Co. v. United States, 175 U. S., 211, 212, this Court was careful to correct the decree of the lower court because it seemed to enjoin the performance of a contract in restraint of trade, not only where such contract embraced interstate commerce but also where it concerned intrastate commerce. In other words this Court took hold of a contract which embraced within its terms both interstate and intrastate commerce, and enjoined its execution so far as it affected interstate commerce, and refused to enjoin so far as it affected intrastate commerce.

If, therefore, the determining of the liability of a carrier to its employees is a regulation of commerce at all, Congress cannot determine such liability except as relates to interstate commerce. It cannot regulate the entire liability of a carrier to its employees but must confine its regulation to the limits prescribed for Congress by the Constitution, namely, those of interstate commerce.

This Act is not a regulation of commerce at all.

Suppose, for the sake of argument, that Congress were to pass a law to the effect that every carrier engaged in interstate commerce should be liable to each of its employees engaged in interstate commerce, for negligence; or suppose that Congress were to enact a law that every carrier engaged in interstate commerce should be liable to every person, including its other employees, for the negligence of an employee engaged in interstate commerce. Would such an act, in either form, be fairly within the purview of the Constitution? In other words, would such an act be a regulation of interstate commerce?

It must be admitted that when the Constitution was formed the thirteen states composing the Union were all governed by the common-law. This system of jurisprudence provided rules governing the ordinary relations in life—husband and wife, parent and child, guardian and ward, master and servant. From time to time these states and other states which had been admitted into the Union have, we suppose without exception, passed laws changing the common-law rules

as to all of these relations. A large body of statutes has been passed in reference to the relation of master and servant.

It has been recognized by this Court that under the common-law as well as the maritime law there is no remedy where an individual, having been injured through the negligence of another, dies after the hurt. As to the common-law the case of Insurance Co. v. Brame, 95 U. S., 754, is decisive, and as to the maritime law, The Harrisburg, 119 U. S., 199, 204, is equally decisive. We suppose there is not a state in the Union which has not passed laws giving to the personal representative of the injured employee, who dies of the hurt, a right of action against the employer; and certainly there has been no effort to limit this legislation to employees engaged in intrastate commerce or to employees injured by other employees engaged in intrastate commerce. In other words, we submit it has never suggested itself to the mind of the legislator that the relation of master and servant, as a relation, the liability of the master to the servant, and the limitation upon such liability, are not matters of purely domestic concern.

In Southern Pacific Co. v. Schoer, 114 F. R., 466, 470, it is said:

> "The unquestioned rule is that the states have the right to regulate, within reasonable limits, the relations between employers and employees within their borders, and to fix, by legislative enactment, the liabilities of the former for the acts and the negligence of the latter."

Various cases have come to this Court involving the fellow-servant laws of the states. We mention, by way of example:

Missouri R'y Co. v. Mackey, 127 U. S., 206.
Minneapolis & St. Louis R'y Co. v. Herrick, 127 U. S., 210.
Chicago R. R. Co. v. Pontius, 157 U. S., 210.
Tullis v. Lake Erie & Western R. R., 175 U. S., 348.

These fellow-servant laws were not made by the states to apply simply to corporations created by the particular state enacting the law, nor as applicable alone to the citizens of such state, but were general in their application, applying to all persons, individuals or corporations carrying on business within the state, and without regard to the character of that business. They were vigorously assailed in this Court, and

yet there was not a suggestion, by Court or counsel, that they were in any way inimical to the commerce clause of the Constitution.

Again, there is a series of cases—Missouri Pacific R'y v. Humes, 115 U. S., 513; Minneapolis R'y Co. v. Beckwith, 129 U. S., 26; M. & S. L. R. Co. v. Emmons, 149 U. S., 364—where state legislation required railroads to fence their tracks, and imposed upon them single or double liability for damages growing out of their failure so to do. There is no doubt that these were interstate roads, and yet, although the constitutionality of these acts was attacked in this Court, no one suggested that they were regulations of interstate commerce.

The same is true of the case of St. Louis & San Francisco R. R. v. Mathews, 165 U. S., 1, where this Court had under consideration an act of the State of Missouri, making a railroad liable for accidental fires. Here no suggestion was made that this was a regulation of commerce, but the Fourteenth Amendment was invoked, although without success.

We think it most significant that when state legislation has been attacked in this Court as violative of the Constitution of the United States

(a) because it required an express company to be licensed by the state in order that it might carry on an intrastate business (Osborne v. Florida, 164 U. S., 650), or (b) because it taxed the Pullman Company for carrying on an intrastate business (Pullman Co. v. Adams, 189 U. S., 420), or (c) because it taxed a railroad company on its cab service (Pennsylvania R. R. Co. v. Knight, 192 U. S., 21), or (d) because it required separate coaches for the races (Hall v. DeCuir, 95 U. S., 485, and various other cases), or (e) because it required trains to stop at certain stations (Gladson v. Minnesota, 166 U. S., 430, and various other cases), or (f), because it required engineers to be licensed (Smith v. Alabama, 124 U. S., 465), or (g) because it required engineers to be examined for color blindness (Nashville R'y v. Alabama, 128 U. S., 96), the argument of counsel and opinion of Court have been at once directed to the consideration of the commerce clause of the Constitution.

On the other hand, when state legislation has been attacked in this Court as invalid (a) because it altered the rule of fellow servant (Missouri R'y Co. v. Mackey, 127 U. S., 106, and various other cases), or (b) because it ren-

dered a railroad company liable for stock killed on account of failure to fence (M. P. R'y v. Humes, 115 U. S., 513), or (c)because it rendered a railroad company liable for fire set without negligence (S. L. &. S. F. R. R. v. Mathews, 165 U. S., 1), in no one of the cases, although all these laws were general in their nature and applicable to intrastate as well as interstate commerce, has the argument of counsel or opinion of Court so much as hinted that these matters have any sort of relation to the commerce clause.

Repeating the language of the Constitution, "Congress shall have power to regulate commerce with foreign nations and among the the several states and with the Indian Tribes," in Gibbons v. Ogden, 9 Wheat., 189, Chief Justice MARSHALL said:

> "Commerce undoubtedly is traffic, but it is something more; it is intercourse; it describes the commercial intercourse between nations and parts of nations in all its branches and is regulated by prescribing rules for carrying on that intercourse."

When cases have come to this Court involving the question whether a particular state law is a regulation of interstate commerce, the question

has been, does the state law put a burden on interstate traffic. Examples of these cases are found in

Brown v. Maryland, 12 Wheat., 420.
Leisy v. Hardin, 135 U. S., 100.
Robbins v. Taxing District of Shelby, 120 U. S., 489.

Or the question has been, does the state law place a burden on interstate transportation. Examples of this class are found in

Gibbons v. Ogden, 9 Wheat., 1.
Crandall v. Nevada, 6 Wall., 35.
Wabash R. R. v. Illinois, 118 U. S., 557.

Extending the quotations which we have just made from 9 Wheaton, 189, we find:

> "The subject to be regulated is commerce, and our Constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word."

Again, at page 196:

> "What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed."

So far, then, as we can derive a definition

from this case, it would seem that commerce "is regulated by prescribing rules for carrying on that intercourse," and the power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed."

Does the Act under consideration prescribe any rule as to traffic or transportation? No rule whatever is laid down. The carrier is not required, while engaged in interstate commerce or not so engaged, to conduct his business in any particular way. There are no regulations to which the carrier is required to conform, or, failing in obedience to which, he is to be rendered liable in a civil or a criminal forum.

The Act is simply a bold attempt to regulate one of the ordinary relations of life, that of master and servant, a relation hitherto supposed to be entirely within the control of the state. If Congress can say that a master shall be liable to his servant in a case in which, by the law of the state where the relation exists, there is no such liability, it can, of course, say that there shall be no liability, notwithstanding the state law has created a liability. If, therefore, Congress can say that upon the death of the employee his personal representative shall have a right of action, it can

equally say that notwithstanding the state laws to the contrary, upon the death of an employee of an individual or corporation engaged in inter-state commerce, the common-law rule that a personal action dies with the person, shall obtain.

If Congress can thus take hold of the relation of master and servant, it can with equal power take hold of the relation of guardian and ward. The legislation of the various states provides what power the guardian has over the person of his ward—the right to apprentice him for instance; and in the same way the power of the parent over the child; the right to his wages; the right of the father, or, in the case of the death of the father, of the mother, to the control of the minor, and the right to receive his wages. There is also a large body of statutes (we suppose, a law in every state in the Union) prescribing how a minor can be emancipated by the voluntary act of the parent or of the guardian, and providing for liability, civil or criminal, in case an individual or a corporation takes into employment—particularly employment of a dangerous character—such minor without going through these forms of emancipation.

It has been heretofore supposed that all these

were matters of domestic legislation—and by domestic we mean state legislation, but not more so than the ordinary relation of master and servant. If this act is a regulation of commerce, an act providing how one engaged in interstate commerce can employ a minor, with or without the consent of his parent or guardian; under what regulation; at what age, and in what character of employment, is equally a regulation of interstate commerce. None of these are rules for carrying on intercourse, or rules by which commerce is to be governed.

This is not to argue that Congress may not prohibit the employment in interstate transportation of persons whom it may deem incompetent to conduct such transportation with safety, nor to argue that Congress cannot regulate the number of hours of continuous service to be exacted of an employee taking part in interstate transportation. Whether such acts as these are or are not within the domain of Congress, is a matter not necessary in this case to determine. The extent of our argument is that Congress cannot pass laws whose purport is simply to prescribe rules as to the ordinary relations of life, such as parent and child, guardian and ward, master and

servant, or to determine the obligations and liabilities of these relations.

Hitherto, with the exception of this and one or two other acts untried in this Court, Congress has been careful, in exercising its power to regulate commerce, to prescribe a rule by which either traffic or transportation is to be governed, and to provide penalties for a violation of such rule. Examples of regulation of traffic are found in the Anti-Trust Act, the Meat Inspection Law and the Pure Food Law (the last two being Acts of the recent Congress).

The Anti-Trust Act prohibits "every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations;" also forbids the monopolization or a conspiracy to monopolize "any part of the trade or commerce among the several states or with foreign nations."

The Pure Food Law prohibits the "introduction into any state or territory or the District of Columbia, from any other state or territory or the District of Columbia, or from any foreign country, or shipment to any foreign country, of any article of food or drugs which is adulterated or misbranded within the meaning of this act."

The Meat Inspection Act provides that "for the purpose of preventing the use in interstate or foreign commerce, as hereinafter provided, of meat and meat food products which are unsound, the Secretary of Agriculture may cause to be made, by inspectors appointed for that purpose, an examination and inspection of all cattle before they shall be allowed to enter into any slaughtering establishment in which they are to be slaughtered and the meat and meat food products thereof are to be used in interstate or foreign commerce."

Examples of regulations of transportation between the states are the act regulating the carriage of explosives, the Interstate Commerce Law and the Safety Appliance Law.

By Sections 4278 and 4279 of the Revised Statutes the transportation of nitro-glycerine is prohibited "upon or in any vessel or vehicle used or employed in transporting passengers by land or water, between a place in any foreign country and a place within the limits of any state, territory or district of the United States, or between a place in one state, territory or district of the United States and a place in any other state, territory or district thereof;" and such

transportation of nitro-glycerine is likewise prohibited in a vessel or vehicle of any description, unless the same is packed as therein prescribed.

The language of the Interstate Commerce Law is too familiar to be repeated.

The Safety Appliance Law provides: "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine engaged in moving interstate traffic not equipped with a power-driving wheel brake, . . or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed." It further provides: "It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its lines any car used in moving interstate traffic not equipped with couplers coupling automatically by impact." It is again provided: "It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

It is true that this act as amended by an act approved March 3, 1903, so as to provide that the original act "shall be held to apply to common carriers by railroads in the territories and the District of Columbia, and shall apply in all cases whether or not the couplers brought together are of the same kind, make or type; and the provisions and requirements hereof, and of said acts, relating to train brakes, automatic couplers, grab-irons and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith."

In the case of Johnson v. Southern Pacific Company, 196 U. S., 1, it is said of this amendment:

> "As we have no doubt of the meaning of the prior law, the subsequent legislation can not be regarded as intended to operate to destroy it. Indeed, the latter act is affirmative, and declaratory, and in effect only construed and applied the former act."

At any rate, if the amendment of 1903 should

be construed as applying to every locomotive and every car belonging to a railroad engaged in interstate commerce, then it has not so far received the sanction of this Court as to its constitutionality.

In the legislation affecting interstate traffic, Congress has said: "You shall not make a contract in restraint of trade; you shall not enter into a conspiracy to monopolize interstate trade; you shall not send into other states or receive from other states packages of food not marked as prescribed by law; you shall not send into other states meat products, unless the animals which you slaughter and the meats which your factories produce have been inspected." A violation by the person engaged in business of this character, of these rules, renders such person amenable to the punishment set forth in the acts.

In the act governing the transportation of explosives, Congress says: "You shall not transport nitro-glycerine by passenger train; if you transport nitro-glycerine by freight train you shall see to it that it is packed in a particular way."

The Safety Appliance Act provides that loco-

motives pulling interstate trains shall have a certain kind of brake; that cars in interstate trains shall have certain kinds of couplers, and cars in interstate trains shall have certain kinds of grab-irons or hand-holds.

The Interstate Commerce Law says: "You shall not discriminate in rates as between persons and places; you shall charge no more than reasonable rates; you shall not allow rebates; you shall make public all your rates; you shall not give free transportation, except to a limited class of persons."

In all these cases, both of traffic and transportation, there is laid down a rule which must govern the person concerned, in the conduct of his interstate traffic or his interstate transportation.

The Employers' Liability Act does not prescribe any rule by which commerce is to be governed, or prescribe any rule for carrying on intercourse. How can it be said that to provide that the common carrier engaged in interstate commerce shall be liable to any of its employees for the negligence of any of its officers, agents or employees, thus abolishing the rule of fellow servant, or prescribing that in case of the death of

an employee, his personal representative shall have a right of action for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, and in this way excluding any right of recovery for the benefit of his estate or for the benefit of next of kin not so dependent; or prescribing a change in the rule of contributory neglect; or providing that an employee shall not, by contract, limit the liability of his employer, is a rule by which commerce is to be governed, or a rule for carrying on intercourse between the states?

Law as to Maritime Cases.

It may, however, be argued that Congress has exercised a very broad power in determining the liability of ship owners and masters of ships, to the owners of goods, passengers and employees, and that the exercise of this power has not been challenged and hence contributes that argument of practical construction of the Constitution which will be broad enough to cover the legislation now under consideration.

That there is a very large body of statutes on the subject of transportation of persons and prop-

erty by water, and that this legislation has dealt with many subjects, cannot be denied; but that this legislation finds its authority in the commerce clause of the Constitution, cannot, we believe, be successfully maintained. To the contrary, we submit that it has been determined by this Court, in a case necessarily involving the question, that such legislation is not and cannot be rested on the commerce clause, but is and must be rested on Section 2 of Article III. of the Constitution, which reads: "The judicial power shall extend to all cases of admiralty and maritime jurisdiction."

We do not deny that this Court has said on more than one occasion that these various enactments as to transportation of persons and property by water are justified by the commerce clause. The question was examined by this Court in Butler v. Boston Steamship Co., 130 U., S., 548, and Craig v. Continental Insurance Co., 141 U. S., 644. The case, however, which necessarily involved the question is that of *Ex Parte* Garnett, 141 U. S., 1. That was a case where the Act of Congress limiting the liability of the owners of a vessel, to the value of the ship, was applied to the case of a steamboat navigating

the inland water between two ports of the same state. It would be impossible to justify this on the commerce clause, as it was a matter of strictly intrastate commerce. Mr Justice BRADLEY, in delivering the opinion of the Court, said:

> "It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations and among the several states, in order to find authority to pass the law in question. The Act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is co-extensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce, but in maritime matters it extends to all matters and places to which the maritime law extends."

It is impossible, we submit, to support the judgment in this case by any reference to the power to regulate commerce.

The paragraph we have given above is quoted with approval in Lehigh Valley R'y v. Pennsylvania, 145 U. S., 203.

It is true that in the case of Patterson v. Barque Eudora, 190 U. S., 170, this Court, having

to consider an Act of Congress of December 21, 1898, making it unlawful in any case to pay a seaman his wages in advance, in holding the law constitutional did make a reference to the commerce clause, but the principal authority relied on is that of Robertson v. Baldwin, 165 U. S., 275, where this Court had under consideration the Act of Congress allowing the arrest of deserters from ships by magistrates, and their return to the vessels upon which they had shipped. It was contended that this was in violation of the Thirteenth Amendment. The Court rejected the contention. It did not intimate under what clause of the Constitution the legislation was justified, but here again it would seem plain that it was not the commerce but the maritime clause.

We respectfully submit that this Court will hesitate long in holding that it is competent for Congress to pass an act under the commerce clause applicable to carriers by land, similar to the enactment held constitutional in the Robertson v. Baldwin case. Indeed, this Court, while at times mentioning the commerce clause as having some relation to the regulations of transportation on the high seas and inland

waters, had made plain more than once a marked distinction between the two.

Thus, in The Daniel Ball, 10 Wall., 557, this Court, through Mr. Justice FIELD, said:

> "It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a state; that Congress may take the entire control of the commerce of the country and extend its regulations to the railroads within a state on which grain or fruit is transported to a distant market.
>
> "We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation."

Mr. Justice GRAY, in Pullman Palace Car Co. v. Pennsylvania, 141 U. S., 18, 23, quoting from the opinion of Mr. Justice BRADLEY, in B. & O. R. R. v. Maryland, 21 Wall., 456, says:

> "As has been said by this court: 'Commerce on land between the different states is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect

in reference to the respective constitutional powers and duties of the state and federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land.'"

In Sherlock v. Alling, 93 U. S., 100, there was a suit under an Indiana statute, against the owners of a steamboat for causing the death of the plaintiff's intestate through the negligence of the officers of the boat. In the course of his opinion Judge FIELD says:

"It it true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the person engaged in it, and the instruments by which it is carried on. And leglislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital and other dues they shall be subjected; what rules they shall obey in passing each other; and what provision their owners shall make for the health, safety and comfort of their crews. Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details to guard against accident and consequent loss of life.

"The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of state authority."

Of course this language is to be controlled by the subsequent considered judgments of this Court to the effect that the laws herein mentioned find their authority in the admiralty and maritime jurisdiction of the United States rather than in the commerce clause. But aside from this the language used by the court can fairly be construed to mean that Congress has the right to enact rules for the government of transportation and to prescribe a remedy for their violation. Thus limiting the general language used by Mr. Justice FIELD, it is not in any way inimical to the present argument.

This Court in The Roanoke, 189 U. S., 185, emphasized the principle that the power of Congress to regulate ships and shipping was derived from Section 2 of Article III of the Constitution, and not from the commerce clause. It appeared in this case that a libel had been filed for materials furnished; also for work and labor supplied by the libellants in the repair of the steamship "Roanoke" to certain contractors who had entire charge of the alteration and repair of the steamship. The claimant urged in defense of the libel that the material and labor referred to therein had been furnished on the

order of the contractor, who had been paid by the claimant in full for such material and labor, and it was insisted that the claim by the libellants under the provisions of the statutes of the State of Washington was in violation of Section 2 of Article III of the Constitution, conferring on the courts of the United States admiralty and maritime jurisdiction. This contention was sustained by this Court ,and Mr. Justice BROWN, who wrote the opinion of the Court, said at page 198 as follows:

> "Bearing in mind that exclusive jurisdiction of all admiralty and maritime cases is vested by the Constitution in the Federal courts, which are thereby made judges of the scope of such jurisdiction, subject, of course, to Congressional legislation, the statute of the State of Washington, in so far as it attempts to control the administration of the maritime law by creating and superadding conditions for the benefit of a particular class of creditors, and thereby depriving the owners of vessels of defences to which they would otherwise have been entitled, is an unlawful interference with that jurisdiction, and to that extent is unconstitutional and void."

It is to be noted that the claimant insisted that the provisions of the Washington statutes were void, not only upon the ground that they were in violation of Section 2 of Article III of the Constitution, conferring on the courts of the United States admiralty and maritime jurisdiction, but also upon the ground that they were in violation of the article of the Constitution conferring upon Congress the power to regulate commerce between the States. This latter ground was, however, not referred to, and apparently not sustained by the Court, and the only reason given for holding the statute unconstitutional was that it was in violation of the second section of the third article of the Constitution. In other words, by its decision in this case, this Court seems to have clearly recognized the distinction between the source of power of Congress to regulate ships and shipping and the source of its power to make regulations with reference to interstate and foreign commerce.

The same distinction was evidently in the mind of this Court in the case of Butler v. Boston, etc., Steamship Company, 130 U. S., 527, where Mr. Justice BRADLEY, in delivering the opinion of the Court, said at page 557 as follows:

> "We cannot doubt its power to do this. As the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the state legislatures."

Mr. Justice CLIFFORD, in the case of The Belfast, 7 Wall., 624, 640, recognized that Congress controlled matters relating to navigation under the constitutional provisions relating to admiralty jurisdiction, and at page 640 said:

> "Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants."

In the case of *In Re* Garnett, 141 U. S., 1, referred to above, Mr. Justice BRADLEY, who delivered the opinion of the Court, after referring to a long line of decisions, said at page 15:

> "In all of these cases it was held that the

admiralty and maritime jurisdiction granted to the Federal Government by the Constitution of the United States is not limited to tide waters, but extends to all public navigable lakes and rivers. *In some of the cases it was held distinctly that this jurisdiction does not depend on the question of foreign or interstate commerce*, but also exists where the voyage or contract, if maritime in character, is made and to be performed wholly within a single State."

The Court of Appeals of New York has reviewed very ably all of these cases in this Court, in People v. Knight, 171 N. Y., 354, and has stated its conclusions from such review in very strong and forcible language, which seems to have met with the approval of this Court, inasmuch as the decision of the New York court was affirmed in 192 U. S., 21. Judge CULLOM, who wrote the opinion, clearly pointed out that the source of the power of Congress over the regulation of ships and shipping was entirely distinct from the power given by the Constitution for the regulation of commerce between the States, and was derived from the provisions of the Federal Constitution extending the judicial

power to all cases of admiralty and maritime jurisdiction. At page 364 he said:

> "It will thus be seen that the control of Congress over ships, vessels and the navigation of public waters has finally been placed by the Supreme Court of the United States on the solid foundation of the maritime and admiralty jurisdiction of the Federal Government, and that while the decisions actually made in the Daniel Ball and Lord cases remain the law, the grounds on which they proceeded are no longer deemed tenable and the opinions rendered in those cases no longer authorities."

Aside from the question that the control of Congress over ships and shipping is derived from the constitutional provision as to the maritime jurisdiction of the Federal Government rather than from the commerce clause of the constitution, there arises the suggestion, which we urge upon the Court, that even if the control of ships and shipping was given to Congress under the commerce clause of the Constitution, yet the wide extent of the exercise of that power with reference to matters pertaining to navigation is no precedent for the exercise of such power

by Congress with reference to commerce on land between the states.

Ships upon their voyages represent not the state where their home port happens to be, but the United States as a nation. The flag under which they sail is not that of any state, but the flag of the United States. The highway they follow is the highway of the seas, open to all the nations of the world, and when engaged in commerce they take part in it in their national character upon an international highway. While this may not apply to every ship, some being engaged on a waterway entirely within the boundary of a state, yet in a large sense it is true, and for this reason it can readily be seen that all matters relating to commerce conducted in ships would properly belong to the nation to control through its Congress, whether the legislation enacted by such Congress was a regulation of the commerce, or with reference to the relation of the persons engaged in carrying it on, and for their better protection. That is to say, every phase of the matter is for Congress to control, and so far it has largely legislated with reference to surety in the navigation of such vessels, and with reference to the protection of the health of their passengers,

officers and crews, none of which can be called, to use the words of Mr. Justice GRAY, in Railroad Company v. Solan, 169 U. S., 133, 138, in any "just sense a regulation of commerce."

In Lord v. Steamship Company, 102 U. S., 541, the question was whether the owners of a ship plying between San Francisco and San Diego, California, which was wrecked, could take advantage of the United States statutes relating to limitation of liability. It was urged that they could, upon the ground (1), the commerce in which the ship was engaged was foreign commerce, because the ship was on the high seas and that the statutes were applicable because within the constitutional power of Congress under the commerce clause, and (2), also because the statutes were within the admiralty and maritime power of the United States. The court upheld the first contention and found it unnecessary to pass upon the second one. The reason given for the decision under the first ground was that navigation was a national matter and that the Federal Government necessarily had the authority to pass any kind of legislation upon the subject. At page 544 it was said:

"Navigation on the high seas is neces-

> sarily national in its character. Such navigation is clearly a matter of 'external concern' affecting the nation as a nation in its external affairs. It must, therefore, be subject to the national government. * * * The commerce regulated is expressly confined to a kind over which Congress has been given control. There is * * * here * * * a question * * * of the power of Congress over the commerce of the United States."

The quotation just made from the opinion of Chief Justice WAITE, enforces the point which we desire to press upon the attention of the Court, viz.: that navigation, and ships, and shipping, are matters of national concern, and that everything connected therewith is subject to the direction of Congress, whether in the strict sense a regulation of commerce or not, for the reason that the instruments of such commerce assume a national character when upon the high seas and must therefore be governed in every respect by the nation.

On the other hand, a railroad is essentially under the general management and control of the State governments, except in the single instance of the interstate commerce which it may do.

The founders of our Government deemed it wise to place the regulation of commerce between the States in the Federal Government in order to secure uniformity of such regulation, but in all other respects the management and control of a railroad is in the State governments, and the liability of such railroad to its employees, and its relation to them in every respect, which in no way places a burden upon or prescribes a rule with reference to interstate commerce, are to be determined by the States and not by the nation.

In other words, statutes with reference to sailors, ships and shipping are not precedents for the power to pass the act in question, for the reason that navigation, and all that pertains thereto, down to its minutest details, is solely within the domain of the National Government, while commerce upon the land is in every point and respect a matter for the State alone, except in the one instance of interstate commerce, and in order to come within that single exception, and to enable the Federal Government to act, the legislation of Congress must be directed to a regulation of commerce in the sense that such regulation affects the commerce itself and does not simply relate to the relation to each other of the people

engaged in the care and operation of the agencies employed in such commerce.

In the case of Chicago, Milwaukee & St. Paul Ry. Co. v. Solan, 169 U. S., 133, the plaintiff brought an action to recover $10,000 damages for injuries suffered by him from the derailing, by the defendant's negligence, of a caboose attached to a freight train of the defendant in which the plaintiff was traveling under a written contract, by which the defendant agreed to carry him, with cattle, from Rock Valley, Iowa, to Chicago, Ill. The defense relied upon a clause in the contract that the Company was in no event to be liable to the owner or person in charge of the stock for any injury to his person in any amount exceeding the sum of $500. Under the code of Iowa it was provided that, "No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into." The plaintiff recovered judgment for $1,000, which was affirmed by the highest court of Iowa, and the case was brought to this court by writ of error.

It was argued that the section of the code of Iowa referred to was unconstitutional and void for the reason that it was an attempt to regulate commerce and contracts relating thereto. This Court, after a full consideration of the matter, held that the Iowa law was in no way a regulation of commerce, either interstate or intrastate, but simply had to do with the relations of the carrier to its passengers for the purpose of requiring such carrier to use its utmost care and diligence in the transportation of its passengers. At page 138 of the opinion, written by Mr. Justice GRAY, it was said:

> "It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods."

The words just quoted are certainly applicable to the act in question, which has for its object the making it "more sure that railroad

companies shall perform the duty resting upon them * * * to use the utmost care and diligence" in their relations to their employees, and we respectfully submit that any legislation which has for its sole object and effect the creation of a new liability between a railroad and its employees is in no just sense a regulation of commerce, and must emanate from a state and not from the nation.

We cannot better conclude this branch of the subject than by quoting from the opinion of Judge EVANS, who decided this case at the circuit.

> "While the courts would be exceedingly slow to inquire into the mere appropriateness of legislation, they cannot decline the duty of inquiring whether legislation is within the constitutional power of Congress when a proper case demands the investigation, and a most patient consideration of the question in this instance has led us to the conclusion —we think to the inevitable conclusion— that the act of June 11, 1906, only creates and imposes a liability upon certain common carriers to their employees, and in no way prescribed rules for carrying on traffic or commerce among the states, and consequently in no way regulates such commerce.

If the operation of the act could in any wise affect commerce among the states, it would do so in a manner so remote, incidental and contingent as in no proper sense to afford a factor of any value in determining the question now in contention. With what the Supreme Court has said in many cases before us, and with an open Constitution to control, we should be trifling with important things if we gave force to any other conclusion. Indeed, it may be said that it is obvious that Congress, in the act referred to, had in contemplation no more than the creation of the liability mentioned, and it would be a most strained construction to hold that it included anything broader than that. Creating new liabilities growing out of the relations of master and servant on the one hand, and regulating commerce on the other, are two things so entirely different that confusion of the judicial mind upon them is hardly to be expected under normal conditions. In the opinion of the Court the act does not regulate commerce among the states. While Congress seems to have desired in this instance to exert the power given by the Constitution for that purpose, it in fact regulates something which is not commerce at all."

As the Act embraces employees of all kinds, it is void, not being separable.

Assuming, for the sake of argument, that such an act as this, if limited to fixing the liability of a carrier engaged fn interstate commerce, for the negligence of such of its employees as are engaged in interstate commerce, or to such of its employees as are engaged in interstate commerce, would be constitutional, yet the Act embraces all employees; in other words, it was the evident intention of Congress not to confine the Act to any class of employees but to embrace all of the employees of a carrier within the terms of the Act.

This Court has frequently held that Acts of Congress and of state legislatures, partly constitutional and partly unconstitutional, are entirely void unless the unconstitutional can be plainly separated from the constitutional provision.

United States v. Reese, 92 U. S., 214.
Baldwin v. Franks, 120 U. S., 678.
Virginia Coupon Cases, 114 U. S., 269, 304, 305.
Pollock v. Farmers' Loan & Trust Co., 158 U. S., 601.
Connolly v. Union Sewer Pipe Co., 184 U. S., 540.
Illinois Central R. R. Co. v. McKendree, 203 U. S., 514.

This last case quotes from the Trade-Mark Cases, 100 U. S., as follows:

> "If we should, in the case before us, undertake to make by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the Act of Congress, and in others under the state law."

In the present Act there is no distinction made between employees engaged in interstate commerce and those not engaged in commerce at all or engaged in intrastate commerce. The language is plain and it is impossible to say that it applies to one class of employees rather that to another. It applies equally to all. There is no effort made to distinguish between the one and the other. The authorities above quoted show that courts are bound to take laws as they find them and have no right to assume that the legislature would have passed a law other than the one it has passed. If the present enactment is valid as to employees en-

gaged in interstate commerce, of course it displaces in that respect all state enactments on the subject. It determines when employees engaged in interstate commerce can recover for negligence, while other employees of the same employer are governed by entirely different rules. Laws have been passed in many of the states, giving to the personal representative of one who dies of a hurt negligently inflicted, the right to recover damages. These laws further provide how such damages shall be distributed. In very many cases this distribution is substantially different from that provided in the congressional enactment. It cannot be assumed that Congress meant to single out one class of employees from the great mass of employees and to provide that as to them there shall be one fellow servant rule, one rule of contributory neglect, while as to other employees there shall be another rule, namely, that prescribed by the law of the state in which the accident happened. It cannot be assumed that Congress meant to declare that as to actions brought by the personal representatives of one class of employees the fruits of the action shall be distributed among certain persons, whereas in the case of exactly similar actions by other em-

ployees the fruits of the action shall be distributed according to other laws. We can imagine no greater confusion in the jurisprudence of negligence than would result from such legislation. In very many cases it would be impossible for either the employee or the employer to know by what law his rights were governed. We submit, therefore, that it is impossible to say that Congress intended any such result. The language of the Act gives no warrant for such application. It embraces plainly every employee of every interstate carrier, without regard to the nature of his employment. To reduce it to the constitutional limit would be not to construe a law but to enact one.

If it is possible to say that a law covering the relations between an employer and employee is or can be a regulation of commerce, either interstate or intrastate (which we deny), it certainly would seem to be a prerequisite to its being a regulation of *interstate* commerce that it should at least apply to a man engaged in interstate commerce. The act in question creates a liability of an employer in favor of an employee, where none existed prior to the act. Now how can the creation of that liability in favor of the employee

be a regulation of interstate commerce, if such employee is not engaged in interstate commerce at the time the cause of action accrued? Is it sufficient that the employer alone is engaged in interstate business? Must not both parties whose relations are affected or controlled by the act be engaged in interstate commerce, before the act can be deemed a regulation of interstate commerce. In such a case as suggested, there is certainly no more reason for designating the provisions of the act a regulation of interstate commerce than a regulation of intrastate commerce. It would seem as if there was more reason for calling the act a regulation of intrastate commerce than of interstate commerce, when the party in whose favor the liability is created was engaged at the time in intrastate commerce. The more important consideration is the situation of the party in whose favor the liability accrued. Was the plaintiff then engaged in interstate commerce? If so, then the law can properly be called a regulation of interstate commerce. If not, then it would seem to be straining the term to so call it. In other words, it is the condition of the employee which properly should determine whether the regulation is one of inter-

state commerce or intrastate commerce, and an act which undertakes to cover the case of an employee engaged in intrastate commerce only cannot be sustained under the power to regulate interstate commerce.

A laborer on a local trolley line, wholly within a State, on the Atlantic seaboard, could bring an action under this act, if the owner of such trolley line happened to be a carrier doing an interstate business on the Pacific slope. It is certainly difficult to see how the giving of the right of action to such employee could be deemed a regulation of interstate commerce. Surely the commerce between states on the Pacific slope is not affected or regulated in the least degree by the giving to the laborer on the trolley line in the east (entirely disconnected with the business in the west) a right of action where none existed before.

Any number of illustrations can of course be given to show that the act as it stands covers situations which can have no possible bearing or relation to interstate commerce, but the instance given sufficiently indicates the point we wish to bring out, viz.: that it is the occupation of the employee as well as of the employer which must

determine whether a regulation giving a right of action in favor of an employee is a regulation of interstate commerce.

We therefore submit that the Employers' Liability Act is unconstitutional; and we respectfully ask that the judgment be affirmed.

R. S. LOVETT,
ALEX. P. HUMPHREY,
MAXWELL EVARTS,
Of Counsel for Defendant in Error.

APPENDIX.

Employers' Liability Act.

An Act Relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track roadbed, ways or works.

SEC. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury

in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

SEC. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: *Provided, however*, That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.

SEC. 4. That no action shall be maintained under this Act, unless commenced within one year from the time the cause of action accrued.

SEC. 5. That nothing in this Act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees under the safety-appliance Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three.

Approved June 11, 1906.

No. 222

Report

of the committee appointed at the

CONFERENCE OF COUNSEL FOR

RAILROAD COMPANIES

In Louisville, Kentucky.

Sept. 26-27, 1906

On Questions Arising Under the Act of Congress, Known as the Employers' Act, Approved June 11, 1906.

(See this Act in Appendix B)

REPORT OF COMMITTEE.

In pursuance of our appointment at the Louisville Conference, we hereby submit the following report on the validity and construction of the Employers' Liability Act. Judge J. W. Bonner, of Nashville, District Attorney of the Illinois Central, attended one of the meetings of the committee and contributed a valuable paper dealing with the third section of the act. Mr. Benj. D. Warfield, of Louisville, District Attorney of the Louisville & Nashville, has attended all of our meetings, and we are indebted to him, and also to Mr. Edward W. Hines, General Solicitor of the same company, for very many valuable suggestions and criticisms.

THE ACT UNDER CONSIDERATION.

The act under consideration became a law June 11, 1906, and is entitled "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and Common Carriers Engaged in Commerce between the States and between the States and Foreign Nations, to their Employes." (*For Act see Appendix B.*)

WHAT CARRIERS ARE EMBRACED WITHIN THE ACT.

The first thing to be determined is, what carriers are embraced within the terms of this act.

The language is very broad: "Every common carrier engaged in trade or commerce in the District of Columbia or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or

between the District of Columbia and any State or States or foreign nations."

The act, therefore, embraces not simply railroads, nor simply individuals and corporations engaged in the transportation of persons or property by land. The language is: "Every common carrier engaged in trade or commerce." It includes, therefore, not only railroads, but carriers by sea or by water, upon the navigable waters of the United States, provided some of their trade is between two States. It also includes express companies and terminal and transfer companies operating between cities on waters which divide two States, for instance, Louisville, Ky., and New Albany and Jeffersonville, Ind.; Cincinnati, Ohio, and Covington and Newport, Ky.; St. Louis, Mo., and East St. Louis, Ill.; Philadelphia, Pa., and Camden, N. J.; New York, N. Y., and Jersey City, N. J.; also ferries across rivers which form the boundaries of States.

The act thus embraces the largest number of common carriers. For it is not confined to carriers exclusively engaged in interstate trade or commerce, but applies to every common carrier engaged in trade or commerce between the States or with foreign nations, whether such interstate commerce is simply a part of its business or all of its business.

WHAT EMPLOYES ARE EMBRACED BY THE ACT.

The employes to whom this act is made applicable are described in equally broad terms. "Every common carrier engaged in trade or commerce shall be liable to any of its employes, or, in case of his death, to his personal representative, for the benefit of his widow and children." As the carrier need not be engaged exclusively in interstate commerce, so the employe need not be engaged in interstate

commerce, nor, indeed, in commerce at all. The act does not provide simply that every employe engaged in interstate commerce shall have a remedy, but that every employe of a carrier engaged in interstate commerce shall have a remedy. The language embraces, then, all employes, without any regard to their character of service and without any regard to whether, at the time of the injury either by the negligence of other employes or by a defect in cars, engines, appliances, machinery, track, roadbed, ways or works, they are engaged in interstate transportation, or, indeed, in transportation of any kind. Of employes of common carriers only a minority are engaged in the work of transportation, and a still smaller minority in the work of interstate transportation. This is certainly true of railroads, although less true of carriers by water. The act is equally applicable to the engineer of an express train and the engineer of a local train, the section hand, the carpenter in the car shop, the mechanic in the machine shop, the clerk in the auditor's office, the driver of an express company's wagon.

WHAT NEGLIGENCE IS EMBRACED IN THE ACT.

The act is equally broad in embracing all kinds of negligence. The language is: "shall be liable to any of its employes for all damages which may result from the negligence of any of its officers, agents or employes, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, ways or works." This seems to do away entirely with the fellow servant doctrine. The liability is to "any" of its employes, for all damages which may result from the negligence of "any" of its officers, agents or employes.

There are certain cases construing statutes reading "where any person may lose his life, the corporation or individual guilty of negligence shall be liable to his administrator," as limited by the fellow servant doctrine.

Miller vs. Mo. Pac. R. R., 109 Mo. 350 (32 Am. St. Rep. 673).

Sullivan vs. Mo. Pac. R. R., 97 Mo. 113.

Proctor vs. Han., etc., R. R., 64 Mo. 112 (9 Am. Rwy. Rep. 440), overruling Schultz vs. Pac. R. R., 36 Mo. 13.

Lutz vs. Atlantic, etc., R. R., 6 N. Mex., 496 (53 Am. & Eng. Rwy. Cas. 478).

Sullivan vs. Railway Co., 11 Iowa, 422.

Carle vs. Rwy. Co., 43 Me. 271.

Railway Co. vs. Farrow, 6 Col. 498 (11 A. & E. Rwy. Cas. 239).

These cases are, however, not sufficient to control the broad language in this statute—shall be liable to "any" of its employes, for all damages which may result from the negligence of "any" of its officers, agents or employes. Aside from a difference in language, the marked difference between these cases and this act is that the statutes therein construed were those giving a right of action to the personal representative, whereas, under the common law, as an action for personal injury did not survive, he would have had none. It is not to be supposed that the personal representative would be given a right of action where if the deceased person had lived he would have had no right of action. The statutes were, therefore, properly construed as giving to the personal representative the same right of action, but no greater right than the individual would have had if he had survived.

The language of the present act is the same, in substance, as that construed in Missouri, etc., Company vs. Mackey, 127 U. S., 205 as abolishing the fellow servant doctrine.

But this act does not simply abolish the doctrine of fellow servant; for by the second section it alters the doctrine of contributory negligence, and by the third section radically limits the right of the employer and employe to agree upon the terms of employment. Thus, by Section 2, it is provided that in actions thereafter brought "the fact that the employe may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe." And by Section 3 it is enacted "that no contract of employment, insurance, relief benefit or indemnity for injury or death, entered into by, or in behalf of, any employe, nor the acceptance of any such insurance, relief benefit or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries or death of such employe."

The first provision, i. e., the one in regard to contributory neglect, introduces an entirely new rule; and the other prohibits contracts of employment from being made on terms heretofore declared to be clearly valid by the Supreme Court.

In B. & O. S. W. R. R. vs. Voigt, 176 U. S. 498, that court held that a contract by an employe, in consideration of his employment, that he would not hold a railroad liable to him for negligence, did not contravene public policy and was valid and enforcible.

RIGHT OF ACTION IN CASE INJURED EMPLOYE DIES.

After giving a right of action to the employe, the statute proceeds: "shall be liable to any of its employes, or, in the case of his death, to his personal representative, for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him."

Probably every State and Territory of the United States has a statute similar to Lord Campbell's Act, giving a right of action for negligence where the person injured has not survived the hurt. In Tiffany on Death by Wrongful Act (Edition 1893) there is an analytical table of these statutes, showing when the action lies, who may sue, for whose benefit suit is to be brought, how the recovery is to be distributed, the measure of damages, and when the action is to be commenced. In most cases the personal representative is the one designated as having the right to sue, although in some instances this right is given to others, as the husband or wife, or persons dependent upon the deceased for support, or the guardian, or the State for use of the person entitled to the damages, or minor children. Generally, the recovery is for the exclusive benefit of those persons who would take the personal estate of the deceased person under the statute of distribution. Sometimes, however, the damages are for the exclusive benefit of particular kindred, and in one instance (and perhaps more) the jury are allowed to distribute the recovery among the persons entitled to the benefit of the action. Generally speaking, the acts provide that the amount recovered shall not go to the payment of debts of the deceased. In many instances

there are exceptions to the application of the statute of distribution in the event of particular persons surviving, as a husband or wife. In some instances the damages are limited in amount, that is, may not exceed five thousand dollars or ten thousand dollars. In some cases the recovery is to be administered as other personal property of the deceased, and is, therefore, applicable to the debts of the deceased. In one instance, at least, it is provided that if the deceased leaves no widow, husband, child, father or mother, then the recovery is to become a part of the personal estate of the deceased, and after the payment of his debts the remainder, if any, is to pass to his kindred as is directed in the statute of distribution.

Without going more particularly into these various statutes enough has been said to show that the statute under consideration differs radically from many of them. For instance, the right of action is vested alone in the personal representative; the damages are to go to the widow and children (the statute not showing how divided); if there are no widow and no children, then the recovery is to go to the parents; if there are no parents, then the recovery is to go to the next of kin dependent upon him; and there is no limitation on the amount of recovery.

Having thus determined to what carriers this act is by its terms made applicable, to what employes of such carriers it is made applicable, what negligence is embraced within its terms and what right of action is granted in the case of the death of the employe injured, we are ready to consider whether this act is within the power of the Federal Congress.

PART I.

CONSTITUTIONALITY OF THE ACT.

I. *Is the Act Constitutional as Applicable to Employes Engaged in Intrastate Commerce, or Not Engaged in Commerce at all?*

The inquiry may be conveniently directed to the ascertainment of whether the act is constitutional, considered as a law giving a remedy to an employe or, in case of his death after the hurt, to his personal representative, against a common carrier, in a case where such employe is in the employment of a common carrier engaged in interstate commerce and is himself not engaged in any act of commerce at all, or in a case where such employe, while in the employment of a common carrier engaged in interstate commerce, is at the time of his injury engaged in intrastate commerce.

Congress derives its power to pass this law, if power it has, from Section 3 of Article VIII of the Constitution. This reads as follows:

> "Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes."

Intrastate Commerce Is a Matter of Exclusive State Control.

In considering the meaning of this clause, Chief Justice Marshall, in Gibbons vs. Ogden, 9 Wheat. 1, at 194, said:

> "It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which

does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself."

In the Trademark Cases, 100 U. S. 96, Mr. Justice Miller said:

"Governed by this view of our duty, we proceed to remark that a glance at the commerce clause of the Constitution discloses at once what has been often the subject of comment in this court and out of it, that the power of regulation there conferred on Congress is

limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes. While bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress."

In Wabash Railway Company vs. Illinois, 118 U. S. 564, Mr. Justice Miller said:

"If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the States. It has often been held in this court, and there can be no

doubt about it, that there is a commerce wholly within the State which is not subject to the constitutional provision, and the distinction between commerce among the States and the other class of commerce between the citizens of a single State, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other."

Expressions similar to these might be multiplied but they are sufficient to show that there is a commerce over which the Federal Congress has no control, viz., the internal commerce of a State.

The Federal Congress can regulate commerce between the States. The State legislature can regulate commerce within the State. Where a corporation is engaged both in interstate and intrastate commerce there is no more reason for holding that Congress can regulate its whole commerce, viz., that which is intrastate as well as that which is interstate, than for holding that the State can regulate its whole commerce, viz., that which is interstate as well as that which is intrastate. The power of Congress and the power of the State are each necessarily superior and exclusive within its own sphere.

Assuming it to be true that the power of Congress over interstate commerce is exclusive, there is no doubt that in some instances a State can, under its police power, pass laws which, until Congress interferes, do amount, in a certain sense, to a regulation of interstate commerce. Such State legislation is valid until Congress shall pass some legislation on the subject. But there is at no time any power of Congress to pass any legislation which shall be a regulation of intrastate commerce.

It may be inconvenient to have two systems of law applicable to the same carrier, but in this respect the carrier is not different from every other citizen of the United States. We are all bound to regulate our conduct by Federal legislation as far as the Federal government has power, and by State legislation so far as the State has power. It may be inconvenient to have one law apply to a corporation *quoad* its intrastate commerce, and another rule to apply *quoad* its interstate commerce; but this is an inconvenience which inheres in the dual nature of our government.

There are very many railroads in the United States which are chartered under the laws of a single State and yet whose lines extend into many other States. These railroads carry on commerce purely internal, in the State of their creation; and also carry on commerce purely internal, in other States where they are licensed to conduct their enterprise. While Congress has the right to regulate the commerce of such carriers between the States, yet it belongs severally to each of the States where the carrier has its line, to regulate the intrastate commerce of such carrier. A carrier, such as a railroad company, may be a corporation whose lines are entirely confined to one State, and yet it may be engaged in interstate commerce. But whether the carrier has a line in only one State or in more than one State, to the extent to which it engages in interstate commerce it is subject to the regulations of Congress. (C. N. O. & T. P. Ry. Co. vs. Interstate Commerce Commission, 162 U. S., 191-2.) But this does not make it subject to the regulations of Congress as to its intrastate business.

There are very many cases decided by the Supreme Court of the United States along different lines of inquiry, which bear out these propositions.

Cases Holding that a Carrier Engaged in Interstate Commerce Is Subject to State Control as to its Intrastate Business.

A corporation may be engaged generally in interstate commerce, and, therefore, subject to Congressional regulation, but may elect to do an intrastate business, and as to such intrastate business be subject to regulations of the State.

In Osborne vs. Florida, 164 U. S. 650, it was held that the State of Florida had the right to exact from the Southern Express Company, a corporation engaged in interstate commerce, a license for carrying goods from point to point in Florida.

In Pullman Company vs. Adams, 189 U. S. 420, the Supreme Court had under consideration a statute of the State of Mississippi, imposing a tax on each sleeping and palace car company carrying passengers from one point to another point within the State. The court held that as the Pullman Company, although engaged in interstate commerce, elected to carry passengers from point to point within the State of Mississippi and to collect a fare therefor, it was competent for the State of Mississippi to tax this business.

Another case is that of Pennsylvania Railroad Company vs. Knight, 192 U. S. 21. There was involved the power of the State of New York to tax the franchise value of doing a cab business from the railroad station of the Pennsylvania Company in the city of New York to hotels and dwelling houses, and from hotels and dwelling houses to the station. It was held that the right to do such business was taxable by the State of New York; that it was not interstate commerce.

Here, again, is a case of a railroad company doing an interstate commerce business and also carrying on a busi-

ness which is intrastate in character, with the power of Congress to regulate its interstate business, and the power of the State to regulate its intrastate business.

These cases are referred to in United States vs. Geddes, 131 F. R. 452. It was there held that a narrow gauge railroad, entirely within the State of Ohio, and which carried on no interstate commerce business, was not subject to the terms of the Safety Appliance Act.

Cases Involving State Statutes Requiring Carriers to Provide Separate Accommodations for the Races.

There is a series of cases involving the right of the States to pass separate coach laws. The first of these is Hall vs. DeCuir, 95 U. S. 485. This was a suit by a colored woman against a steamboat company for refusing to allow her to occupy the cabin set apart for white people, the law of Louisiana providing that the regulations of carriers should make no discrimination on account of race or color. In delivering the opinion of the court in this case, holding the act unconstitutional as a regulation of interstate commerce, Mr. Chief Justice Waite premised by saying that the act of Louisiana must be treated as requiring those engaged in interstate commerce to give all persons traveling in that State in the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color, such being the construction given to that act in the court below and conclusive upon the Supreme Court as the construction of a State law by the State Court. He further said:

> " We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the States."

He then says that there can be no doubt that exclusive power has been conferred upon Congress to regulate commerce among the States. He cites Munn vs. Illinois, 94 U. S. 113, as deciding that a State may regulate the charges of public warehouses; and C. B. & Q. vs. Iowa, 94 U. S. 155, as holding that a State may regulate the charges of railroads situate entirely within the State; and also other cases holding that States may authorize the construction of dams and bridges across navigable streams situate entirely within their respective jurisdictions; and says that the same is true of turnpikes and ferries. He then says:

> " By such statutes the States regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions,and over which they have exclusive governmental control, except when employed in foreign or interstate commerce. As they can only be used in the State, their regulation for all purposes may properly be assumed by the State, until Congress acts in reference to their foreign or interstate relations. When Congress does act, the State laws are superseded only to the extent that they affect commerce outside the State as it comes within the State. * * * We confine our decision to the statute in its effect upon foreign and interstate commerce, expressing no opinion as to its validity in any other respect."

This question next arose in the case of Louisville Railway Company vs. Mississippi, 133 U. S. 587. There, a statute of Mississippi requiring all railroads carrying passengers in that State, other than street railroads, to provide equal and separate accommodations for the white and colored races, had been construed by the Supreme Court of the State to apply solely to travel within the State. It was held that the act

was not in violation of the commerce clause of the Constitution of the United States. The court said:

> " The question is limited to the power of the State to compel railroad companies to provide, within the State, separate accommodations for the two races."

The court explained that the difference between this case and that of Hall vs. DeCuir was that the Supreme Court of the State of Louisiana held that the act involved in the DeCuir case applied to interstate carriers and required them, when they came within the limits of the State, to receive colored passengers into the cabin set apart for white persons; that in the present case the Supreme Court of Mississippi had held that the statute applied solely to commerce within the State and that construction being the construction of the statute of the State by its highest court, must be accepted as conclusive. The court said:

> " If it be a matter respecting wholly matters of commerce within a State, and not interfering with commerce between the States, then, obviously, there is no violation of the commerce clause of the Federal Constitution."

The court further said:

> " No question arises under this section, as to the power of the State to separate in different compartments interstate passengers, or to affect in any manner the privileges and rights of such passengers. All that we can consider is, whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the State is no invasion of the power given to Congress by the commerce clause."

The court then quotes from Wabash Railway vs. Illinois, 118 U. S. 557, the paragraph given above.

The next case is Plessy vs. Ferguson, 163 U. S. 537, opinion by Mr. Justice Brown. That was a case involving a law of Louisiana similar to the Mississippi law above considered, and which had been held by the Louisiana court to apply to intrastate commerce only. The act seems to have been attacked as violative of the Thirteenth and Fourteenth Amendments. After quoting from the case of Louisville & New Orleans Railway vs. Mississippi, 133 U. S. 587, the court said:

> " A like course of reasoning applies to the case under consideration, since the Supreme Court of Louisiana in the case of the State *ex rel.* Abbott vs. Hicks, Judge, *et al.*, 44 La. Ann. 770, held that the statute in question did not apply to interstate passengers, but was confined in its application to passengers traveling exclusively within the borders of the State. * * * In the present case no question of interference with interstate commerce can possibly arise, since the East Louisiana Railway appears to have been purely a local line, with both its termini within the State of Louisiana."

The last case is that of Chesapeake & Ohio Railway vs. Kentucky, 179 U. S. 388. The court there held that the Kentucky separate coach law was constitutional, it having been decided by the Court of Appeals of Kentucky that it was applicable to travel within the State only. The Supreme Court based its decision on the cases of Louisville, New Orleans, etc., Railway Company vs. Mississippi, and Plessy vs. Ferguson, and held the Kentucky act as construed by the Kentucky court, constitutional.

Cases Where State Laws Required Railroad Trains to Stop at Certain Stations.

In Gladson vs. Minnesota, 166 U. S. 430, the Supreme Court, in holding an act of the State of Minnesota valid which required all trains, other than through railroad trains, entering that State from any other State, and trans-continental trains, to stop at all county seats, and in holding such law constitutional as to the St. Paul & Duluth Railroad (a line wholly intrastate), said:

> " A railroad corporation created by a State is for all purposes of local government, a domestic corporation, and its railroad within the State is a matter of domestic concern. Even when its road connects (as most railroads do), with railroads in other States, the State which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the business of the incorporation and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the State. They are not in themselves regulations of interstate commerce; and it is only when they operate as such, in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to

the paramount authority of the Constitution of the United States."

In the case of Illinois Central Railroad vs. Illinois, 163 U. S. 142, a statute of Illinois requiring that all railroad trains should go to and stop at county seats along its line, was held unconstitutional; but this was the case of a railroad established to a certain extent under national authority. And the statute was held invalid in requiring the railroad train to go out of its way to Cairo and then back again to the main line, such train being one carrying interstate freight and interstate passengers.

In L. S. & M. S. R. R. Co. vs. Ohio, 173 U. S. 285, a statute of Ohio was held constitutional which required at least three trains a day each way to stop at all towns in Ohio having a population of 3,000.

In C. C. C. & St. L. Ry. vs. Illinois, 177 U. S. 514, where all these cases are reviewed, it appeared that the plaintiff in error had four trains a day each way across the State of Illinois, these trains stopping at all county seats. It put on a special fast train called the Knickerbocker Express. It was held that it could not be required to stop this train in Illinois at all.

In L. & N. R. R. vs. Kentucky, 161 U. S. 677, it was held competent for the State of Kentucky to prohibit the consolidation of parallel or competing lines of railway, even though such lines of railway were engaged in interstate commerce.

Cases Involving Power to Fix Intrastate Rates.

A striking instance of the power of the State over intrastate commerce, and the absence of such power over interstate commerce, is afforded by contrasting the two cases of L. & N. R. R. Co. vs. Kentucky, 183 U. S. 503, and L. & N.

R. R. Co. vs. Eubank, 184 U. S. 27. The Constitution of Kentucky provides that a charge for a short haul shall not be greater than for a long haul, the provision being almost an exact copy of the section of the Interstate Commerce Law on this subject. The Court of Appeals of Kentucky, however, construed this section as unaffected by competitive conditions. In the first of these cases the Supreme Court held that there was full power in the State of Kentucky to enforce this provision as to shipments between points in Kentucky; while in the second case it held it was not competent to enforce it as between a point in Kentucky and a point in Tennessee. In the first case, in reply to the argument that this was a regulation of interstate commerce, the court said:

> " It may be that the enforcement of the State regulation forbidding discrimination in rates in case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government to be unlawful must be direct and not a mere incidental effect of enforcing the police powers of a State."

Cases Involving the Anti-Trust Law.

Still another series of cases (and the last to which we shall refer), showing distinctly that an individual or a corporation may be subject to a dual control in carrying on a business which is both interstate and intrastate in its character, are those construing and applying the Sherman Anti-Trust Law. We need only refer to three of these cases.

In United States vs. E. C. Knight Co., 156 U. S. 1, the court held that the Sherman Anti-Trust Law did not embrace in its terms the purchase by one corporation of all establishments in which the business of refining sugar was carried on. The following extracts from this opinion are pertinent to our inquiry:

> "It can not be denied that the power of a State to protect the lives, health and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

Again:

> "On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States, and if a law passed by a State in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the State can not occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is

supreme. 'Commerce, undoubtedly, is traffic,' said Chief Justice Marshall, 'but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.' That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State."

Again:

"It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

In Hopkins vs. United States, 171 U. S. 578, the court had under consideration the question whether the Sherman Anti-Trust Law prohibited an agreement among cattle brokers carrying on their business at the stock yards in Kansas City, Missouri, and Kansas City, Kansas, such agreement laying down rules to which the members of the association, styled Kansas City Livestock Exchange, were compelled to conform. The court held that the business

was not such as was embraced by the Anti-Trust Act. We make the following extracts from that opinion:

> " We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affect interstate commerce at all, does so only in an indirect and incidental manner? "

Again:

> " The commission agent in selling the cattle for their owner simply aids him in finding a market; but the facilities thus afforded the owner by the agent are not of such a nature as to thereby make that agent an individual engaged in interstate commerce, nor is his agreement with others engaged in the same business, as to the terms upon which they would provide these facilities, rendered void as a contract in restraint of that commerce. Even all agreements among buyers of cattle from other States are not necessarily a violation of the act, although such agreements may undoubtedly affect that commerce."

Again:

> " It is not difficult to imagine agreements of the character above indicated. For example, cattle, when transported long distances by rail, require rest, food and water. To give them these accommodations it is necessary to take them from the car and put them in pens or other places for their safe reception. Would an agree-

ment among the landowners along the line not to lease their lands for less than a certain sum be a contract within the statute as being in restraint of interstate trade or commerce? Would it be such a contract even if the lands, or some of them, were necessary for use in furnishing the cattle with accommodations? Would an agreement between the dealers in corn at some station along the line of the road not to sell it below a certain price be covered by the act, because the cattle must have corn for food? Or would an agreement among the men not to perform the service of watering the cattle for less than a certain compensation come within the restriction of the statute? Suppose the railroad company which transports the cattle itself furnishes the facilities, and that its charges for transportation are enhanced because of an agreement among the landowners along the line not to lease their lands to the company for such purposes for less than a named sum, could it be successfully contended that the agreement of the landowners among themselves would be a violation of the act as being in restraint of interstate trade or commerce? Would an agreement between builders of cattle cars not to build them under a certain price be void because the effect might be to increase the price of transportation of cattle between the States? Would an agreement among dealers in horse-blankets not to sell them for less than a certain price be open to the charge of a violation of the act because horse-blankets are necessary to put on horses to be sent long journeys by rail, and by reason of the agreement the expense of sending the horses from one State to another for a market might be thereby enhanced? Would an agreement among cattle drivers not to drive the cattle after their arrival at the railroad

depot at their place of destination to the cattle yards where sold, for less than a minimum sum, come within the statute? Would an agreement among themselves by locomotive engineers, firemen or trainmen engaged in the service of an interstate railroad, not to work for less than a certain named compensation be illegal because the cost of transporting interstate freight would be thereby enhanced? Agreements similar to these might be indefinitely suggested.

In our opinion all these queries should be answered in the negative. The indirect effect of the agreements mentioned might be to enhance the cost of marketing the cattle, but the agreements themselves would not necessarily for that reason be in restraint of interstate trade or commerce. As their effect is either indirect or else they relate to charges for the use of facilities furnished, the agreements instanced would be valid, provided the charges agreed upon were reasonable. The effect upon the commerce spoken of must be direct and proximate."

The last case to which we shall refer in this connection is that of Addyston Pipe & Steel Co. vs. United States, 175 U. S. 212. This involved the legality of an association of manufacturers of gas and water pipe. The agreement the court found existing among the manufacturers was held to be inimical to the Anti-Trust Act so far as it related to interstate commerce, and as not governed by that act so far as it related to intrastate commerce. And the court held that the associates could be restrained, under the Anti-Trust Act, from carrying out a part of the agreement, because Congress, under its power to regulate commerce among the States, could prohibit the agreement so far

as it affected that commerce; but the associates could not be restrained from carrying out the agreement, so far as it involved intrastate commerce, because Congress had no power to deal with intrastate commerce.

The following extract from the opinion will make this clear:

> "The views above expressed lead generally to an affirmance of the judgment of the Court of Appeals. In one aspect, however, that judgment is too broad in its terms, the injunction is too absolute in its directions, as it may be construed as applying equally to commerce wholly within a State as well as to that which is interstate or international only. This was probably an inadvertence merely. Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and, therefore, none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the State. The combination herein described covers both commerce which is wholly within a State, and that also which is interstate.
>
> "In regard to such of these defendants as might reside and carry on business in the same State where the pipe provided for in any particular contract was to be delivered, the sale, transportation and delivery of the pipe by them under that contract would be a transaction

wholly within the State, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some non-resident of the State eventually obtained it.

"The fact that the proposal called for the delivery of pipe in the same State where some of the defendants resided and carried on their business would be sufficient, so far as the Act of Congress is concerned, to permit those defendants to combine as they might choose, in regard to the proposed contract for the delivery of the pipe, and that right would not be affected by the fact that the contract might be subsequently awarded to some one outside the State as the lowest bidder. In brief, their right to combine in regard to a proposal for pipe deliverable in their own State could not be reached by the Federal power derived from the commerce clause in the Constitution."

It has been our purpose in making this extended reference to cases decided by the Supreme Court to show that in many instances and in most varying phases that court has determined that there is a duality of control over commerce; that the power of Congress to regulate interstate commerce is no clearer nor more exclusive than the power of the States to deal with intrastate commerce. No effort is made to distinguish between persons and corporations engaged in both interstate and intrastate commerce as one class, and persons and corporations engaged in intrastate commerce as another class. There is no room for the proposition that because Congress has power to regulate interstate commerce it can therefore regulate all commerce of an individual or corporation engaged in interstate commerce, any more than for the

proposition that a State, having power to regulate intrastate commerce, can therefore regulate all of the affairs of an individual or corporation engaged in intrastate commerce. The contrary is true. Congress can not regulate all of the affairs of an individual or corporation, both interstate and intrastate, because such individual or corporation may happen to be engaged in both interstate and intrastate commerce, any more than the State can regulate all of the affairs of an individual or corporation engaged in both intrastate and interstate commerce. Congress has power to regulate interstate commerce, and has power, therefore, to regulate so much of the business of an individual or corporation as may be properly designated as interstate commerce; while the State, on the other hand, has the power to regulate intrastate commerce, and, therefore, has power to regulate so much of the business of an individual or corporation as is intrastate.

It would seem clear, therefore, that if the granting of a right of action to an employe against his employer is a regulation of commerce at all; if the granting to the personal representative of an employe who dies after a hurt negligently inflicted, and the prescribing of how a recovery in such an action shall be distributed, is a regulation of commerce, then Congress has no power over this subject unless the negligence arises out of some relation or the conduct of some enterprise which can be fairly denominated as the conduct of interstate commerce. This would exclude from Congress any power to give a right of action to any employe, or the personal representative of any employe who was not engaged in interstate commerce, and would render the act under consideration unconstitutional so far as it grants a right of action to any person or the personal representative of any person engaged in intrastate commerce or not engaged in commerce at all.

An act determining the liability of employer and employe is or is not a regulation of commerce. If it is not, then Congress has no power to pass this act. If it is, then to fix the liability of an employer to his employe *quoad* interstate commerce is a regulation of interstate commerce. By exactly the same sign to fix the liability of an employer to his employe *quoad* intrastate commerce is a regulation of intrastate commerce. The power of Congress being exclusive in the one case and that of the State in the other, neither can by legislation occupy the whole field. Hence this act if a regulation of commerce at all is void as beyond Congressional authority.

II.—*Is the Act Constitutional as Applied to an Employe Engaged in Interstate Commerce?*

The next subject of inquiry is this: Whether the act is constitutional, considered as a law giving a remedy to an employe (or, in case of his death after the hurt, to his personal representative) against a common carrier, in a case where such employe is in the employment of a carrier engaged in interstate commerce, and is himself, at the time of his injury, from the nature of his employment, engaged in interstate commerce.

This inquiry assumes that the present act can be construed as limited in its terms to embrace alone such a state of case now under consideration. Whether, in view of its plain language, the act can be so limited will be considered hereafter.

We submit at the outset that it would be difficult to state as a proposition of law that the relation of master and servant, as defined by common law or by statute; the consequence to follow from the negligence of the master or

from his failure to provide safe place or safe machinery; how far the negligence of the servant is to affect or bar his suit; for what fellow servant the master is to be responsible; the right of the personal representative to recover; the limit of such recovery or the method in which it shall be distributed, are all, or any of them, regulations of commerce.

When the Constitution of the United States was adopted, the common law of England (which was the common law of all the States) determined all of these matters. It is safe to say that no one ever thought any of these common law rules were regulations of commerce in any sense.

The Supreme Court of the United States has recognized that under the common law as well as the maritime law, there is no remedy where an individual, having been injured through the negligence of another, dies after the hurt. As to the common law the case of Insurance Company vs. Brame, 95 U. S. 754, is decisive; and as to the maritime law, The Harrisburg, 119 U. S. 204, is equally decisive. All of the original States and all of the new States and Territories have, we believe, without exception, passed statutes on these subjects, giving a remedy where the injured person dies of the hurt, prescribing to whom the recovery shall go, and, in many instances, changing the common law rule of fellow servant. These statutes altering the fellow servant doctrine, in many instances have been general in their character, while in others they have been limited to particular employments. So the statutes in regard to recovery where the person injured dies of the hurt, in some cases, have been general, but in others have made a difference dependent upon the character of the employment. These laws have been passed by various States as a part of the great mass of legislation dealing with the ordinary relations in life, such as husband and wife, guardian and ward

parent and child, and nowhere has legislation in regard to the relations between master and servant been considered as a regulation of commerce. Up to the passage of this act Congress has passed no law giving a right of action to an employe against his employer or dealing specifically with such liability.

In Gibbons vs. Ogden, 9 Wheat. 189, Chief Justice Marshall said:

> "Commerce undoubtedly is traffic, but it is something more. It is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

Congress, therefore, has power to regulate interstate traffic and also power to regulate interstate intercourse or transportation.

A large number of cases have come to the Supreme Court, involving the inquiry, whether a particular State law is a regulation of interstate commerce. The question has been: Does the State law put a burden on interstate traffic? Examples of these cases are found in

Brown vs. Maryland, 12 Wheat. 420.
Leisy vs. Hardin, 135 U. S. 100.
Robbins vs. Taxing Dist. of Shelby, 120 U. S. 489.

Or the question has been: Does the State law put a burden on interstate transportation? Examples of this class are found in

Gibbons vs. Ogden, 9 Wheat. 1.
Crandall vs. Nevada, 6 Wall. 35.
Wabash R. R. vs. Illinois, 118 U. S. 557.

In all cases the inquiry has been: Does the State law amount to a regulation of interstate commerce? The inquiry has not been: Does the State law regulate the individual or corporation engaged in interstate commerce? This is not a distinction in words, but a distinction in substance; for the power to Congress is to regulate commerce between the States and not to regulate persons engaged in commerce between the States. Thus far no act of Congress, whose object was to regulate commerce between the States, has been held unconstitutional. With two exceptions Congress has been thus far careful to restrict such laws to commerce between the States and has not attempted to regulate persons engaged in commerce between the States. Examples of regulation of traffic are found in the Anti-Trust Act, the Meat Inspection Law and the Pure Food Law, the last two being acts of the last Congress.

The Anti-Trust Act prohibits " every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations; " and also forbids the monopolization or a conspiracy to monopolize " any part of the trade or commerce among the several States or with foreign nations."

The Pure Food Law prohibits the " introduction into any State or Territory or the District of Columbia, from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country, of any article of food or drugs which is adulterated or misbranded within the meaning of this act."

The Meat Inspection Act provides that " for the purpose of preventing the use in interstate or foreign commerce, as hereinafter provided, of meat and meat food products which are unsound, the Secretary of Agriculture may cause to be made, by inspectors appointed for that purpose, an

examination and inspection of all cattle before they shall be allowed to enter into any slaughtering establishment in which they are to be slaughtered, and the meat and meat food products thereof are to be used in interstate or foreign commerce."

Examples of regulation of transportation between the States are the act regulating the carriage of explosives, the Interstate Commerce Law and the Safety Appliance Law.

By Sections 4278 and 4279 of the Revised Statutes the transportation of nitro-glycerine is prohibited " upon or in any vessel or vehicle used or employed in transporting passengers by land or water, between a place in any foreign country and a place within the limits of any State, Territory or District of the United States, or between a place in one State, Territory or District of the United States and a place in any other State, Territory or District thereof; " and such transportation of nitro-glycerine is likewise prohibited in a vessel or vehicle of any description, unless the same is packed as therein prescribed.

The language of the Interstate Commerce Law is too familiar to be repeated.

The Safety Appliance Law provides: " It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine engaged in moving interstate traffic not equipped with a power-driving wheel brake, * * * or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed." It further provides: " It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact." It is again provided:

" It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

It is true that this act was amended by an act approved March 3, 1903, so as to provide that the original act " shall be held to apply to common carriers by railroads in the Territories and the District of Columbia, and shall apply in all cases whether or not the couplers brought together are of the same kind, make or type; and the provisions and requirements hereof, and of said acts, relating to train brakes, automatic couplers, grab irons and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith."

In the case of Johnson vs. Southern Pacific Company, 196 U. S. 1, it was said of this amendment:

> " As we have no doubt of the meaning of the prior law, the subsequent legislation can not be regarded as intended to operate to destroy it. Indeed, the latter act is affirmative, and declaratory, and, in effect, only construed and applied the former act."

At any rate, if the amendment of 1903 should be construed as applying to every locomotive and every car belonging to a railroad engaged in interstate commerce, then it has not so far received the sanction of the Supreme Court as to its constitutionality.

The two exceptions noted above, in which Congress has assumed to regulate, not interstate commerce but those engaged in interstate commerce, are:

1. The act approved June 1, 1898, which, by its first section is made to apply to common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by river, for a continuous carriage or shipment from one State to another; and which, by the 10th section, provides that any employer subject to the provisions of this act, or any officer of such employer, who shall require any employe or any person seeking employment, to enter into an agreement not to become or remain a member of any labor organization, or shall threaten any employe with loss of employment because of his membership in such a labor organization, shall be punished therefor.

This act has been the subject of consideration before the United States Court for the Western District of Kentucky, and Judge Evans has delivered a forcible opinion, holding it to be unconstitutional as not being a regulation of commerce.

2. The Employers' Act, whose terms we are now considering.

The fact that up to this time obligations and duties of employer and employe have been regarded as governed by the common and statutory law of the States, and that up to this time Congress has not attempted, except so far as stated above, to legislate on this subject, is an argument of great force that the power so to legislate belongs to the States and does not belong to Congress.

Again, it is pertinent to notice the attitude of the Supreme Court in construing State legislation claimed to be invalid as inimical to the Constitution of the United States. We have referred in a former part of this paper to various series of cases wherein State legislation was claimed to be invalid as prohibited by the Constitution of the United

States. In such cases as Osborne vs. Florida, Pullman Company vs. Adams, and Pennsylvania Railroad Company vs. Knight, it was contended that the State laws were unconstitutional as regulations of interstate commerce, because they applied to carriers engaged in interstate commerce; but the court held such acts valid because they applied only to that part of the enterprise of the carrier which was intrastate commerce.

In the series of cases involving the right of the States to pass separate coach laws, these laws were challenged upon the ground that they were regulations of interstate commerce. The court held they were regulations of interstate commerce when they embraced interstate commerce, but when they embraced intrastate commerce alone, then such laws were within the powers of the State.

Another series of cases are those in which the legislatures of the States have passed laws requiring trains to stop. These laws were held valid or invalid as they were, upon the whole review of the case, determined to be or not to be regulations of interstate commerce or obstructions of interstate commerce.

The same is true of the Rate Cases, L. & N. R. R. Co. vs. Kentucky, 183 U. S. 503, and L. & N. R. R. Co. vs. Eubank, 184 U. S. 27, where it was held that the Constitution of Kentucky, in fixing the long and short haul rule without respect to competitive conditions, was constitutional as applicable to intrastate transportation, and unconstitutional as applicable to interstate transportation.

We repeat, the acts of the legislature in all of these cases were assailed as being invalid because they were alleged to be regulations of interstate commerce.

Cases Involving Power of State to Enact Fellow Servant Laws, Fence Laws and Fire Laws.

There is another series of cases involving the power of the State to define the rights of an employe, in other words, involving changes in the common law doctrine of fellow servant.

In Southern Pacific Co. vs. Schoer, 114 F. R. 470, it is said:

> "The unquestioned rule is that the States have the right to regulate within reasonable limits the relations between employers and employes within their borders, and to fix, by legislative enactment, the liabilities of the former for the acts and the negligence of the latter."

The first of the cases of this character considered by the Supreme Court was that of Missouri R. R. vs. Mackey, 127 U. S. 206. There it was held that the State of Kansas had the right to change the fellow servant law. The accident happened in the yard of the Missouri Pacific Railway Company, a corporation created under the laws of Kansas, the yard being in the city of Atchison, and the accident growing out of a collision between two switch engines. The objection made to the law was that it was violative of the Fourteenth Amendment. Nothing is said in the case in regard to its being in any way a regulation of interstate commerce.

The same is true of the case of Minneapolis & St. Louis Railway Company vs. Herrick, 127 U. S. 210, where there was a suit against a Minnesota corporation for an accident happening in Iowa, and the law of Iowa changing the rule as to fellow servants was applied. Again there was nothing said in regard to this being a regulation of commerce. The accident was to a brakeman in endeavoring to couple an engine and a freight car.

This was followed in Chicago Railroad Company vs. Pontius, 157 U. S. 210, where there was an accident to a bridge carpenter. The contention seems to be that the legislation applied only to persons engaged in transportation, and a decision of this question was avoided by the court holding that the employe, at the time of his injury, was engaged in transportation.

In Tullis vs. Lake Erie & Western R. R., 175 U. S. 348, the court held that a statute of Indiana dealing with the liability of railroads to employes was constitutional, following the other decisions. As stated above, however, the only question involved in these cases was whether the acts were constitutional in view of the Fourteenth Amendment.

How, then, does it happen that in no one of these cases is it suggested that the State statutes involved are regulations of commerce? They are not attacked as inimical to the commerce clause of the Constitution, but the sole ground for asserting that they are not constitutional is the provision of the Fourteenth Amendment. We regard it as likewise most significant that when the Supreme Court was called on to consider in such cases as Missouri Pacific Ry. Co. vs. Humes, 115 U. S. 513; Minneapolis Ry. Co. vs. Beckwith, 129 U. S. 26, and M. & Sy. L. Ry. Co. vs. Emmons, 149 U. S. 364, the validity of State legislation requiring railroads to fence their tracks, and imposing upon them single or double liability for damages growing out of their failure so to do, it was nowhere claimed that these laws were regulations of commerce but they were attacked solely upon the ground that they were in violation of the Fourteenth Amendment; and in each case they were held not to be in violation of the provisions of that amendment.

The same is true of the case of St. Louis & San Francisco R. R. vs. Mathews, 165 U. S. 1, where the court had under

consideration an act of the State of Missouri, making a railroad liable for accidental fires. Here no suggestion was made that this was a regulation of commerce, but again the Fourteenth Amendment was invoked and again without success.

In other words, all this class of legislation is held to be within the general legislative domain of the States and it is not even suggested that these laws are in any sense regulations of commerce, either interstate or intrastate. These acts of the various State legislatures, as shown in the opinions, are not applicable simply to railroad corporations chartered by the States making the enactments, but are applicable to railroads chartered in other States, doing business within the legislating State. The right of a legislature to pass such laws as these is not limited to the government of railroad corporations created by the State, or conducting their enterprise wholly within the boundaries of such State, but these laws are sustained and enforced as well against corporations having charters in other States and carrying on their enterprise both in the State of their creation and in the State passing these laws.

What Is a Regulation of Commerce?

In Gibbons vs. Ogden, 9 Wheat. 189, Chief Justice Marshall said:

> "The subject to be regulated is commerce, and our Constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word."

This idea that the Constitution is one of enumeration and not of definition is borrowed from the argument of Mr.

Webster. As we understand it, Chief Justice Marshall here means to say that no branch of the Federal government, Executive, Legislative or Judicial, has any power which is not enumerated; whereas the Constitution of a State assumes that all the powers of government belong to the three branches, and has for its purpose not the granting of power but the defining of power, such defining consisting in stating how the general power of government is to be distributed among the three departments, and what powers ordinarily belonging to government are limited or taken entirely away. When, therefore, we come to consider the power of Congress over commerce it is not a general power, but only such power as is enumerated. Again quoting from Chief Justice Marshall, at page 196 of this case:

> "What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed."

As stated above, there are two branches of commerce, traffic and transportation. Congress has the power, therefore, to prescribe by what rules traffic between the States is to be governed, and by what rules transportation between the States is to be governed. Congress can go no further than this. It can not prescribe any rule by which traffic between citizens of a State is to be governed, or by which transportation between different points in the same State is to be governed.

What rule as to traffic does the Employers' Liability Act contain? Certainly none. Wherein does this act "prescribe the rule by which" transportation "is to be governed?" No rule whatever is laid down. The act provides that the carrier engaged in interstate commerce shall be liable to his employe for negligence; that the personal representative of

the employe who dies after a hurt negligently inflicted shall have a certain remedy; that the recovery shall be distributed among certain persons; that the fact that the negligence is one of a fellow servant shall not prohibit the employe from recovering; that the fact that the employe has been himself guilty of slight negligence shall not prevent a recovery; that it shall be unlawful for the carrier and the employe to make a contract by which the carrier shall limit his liability to the employe. No one of these provisions commands the carrier to conduct his business in any particular way. What is negligence is not defined. It is not said that the carrier shall do this and that and, failing in his duty to conform his conduct to a rule by which his interstate transportation is to be governed, shall be liable for the consequences of such failure. In other words, there is, in the whole of this act, no command whatever, no rule by which the carrier is to regulate the conduct of his business. In the act governing the transportation of explosives between the States Congress says, you shall not transport nitro-glycerine in a passenger train; if you transport nitro-glycerine in a freight car you shall see to it that it is packed in a particular way. In the Safety Appliance Act Congress says, your locomotive pulling an interstate train shall have a certain kind of brake; cars in interstate trains shall have certain kinds of couplers; cars in interstate trains shall have certain kinds of grab-irons or hand-holds. The Interstate Commerce Law says, you shall not discriminate in rates as between persons or places; you shall charge no more than reasonable rates; you shall not allow rebates; you shall make public all of your rates; you shall not give free transportation except to a limited class of persons. In all these cases there is laid down a rule which must govern the carrier in the conduct of his interstate transportation. So, in the Congressional legislation

affecting interstate traffic, you shall not make a contract in restraint of trade; you shall not enter into a conspiracy to monopolize interstate trade; you shall not send into other States or receive from other States packages of food not marked as prescribed by law; you shall not send into other States meat products unless the animals which you slaughter, and the meats which your factories produce, have been inspected. A violation, by the person engaged in business of this character, of these rules, renders such person amenable to the punishment set forth in these acts.

In all of these instances Congress has enacted a rule by which either traffic or transportation is to be governed; and these instances only emphasize the distinction which we have heretofore made, between a regulation of interstate commerce or a rule by which interstate commerce is to be governed, and a regulation of the person or corporation engaged in interstate commerce. It is one thing for Congress to lay down a rule which shall govern interstate commerce, and provide the consequences of the violation of such rule, and another thing to pass a law of the general character of the one under consideration, which lays down no rule whatever by which the carrier is to be governed but simply provides for his liability to his employes for failure to observe the written or unwritten laws which define the term 'negligence."

It may be argued that Congress, by providing that a carrier shall be liable to his employes for negligence (either his own or that of his servants), and further providing that the carrier shall be liable to his employes for failure to furnish a safe place or safe machinery, has enacted a law whose tendency will be to make interstate transportation safe; and it may be argued, as Congress has the right to require a carrier to have safe engines and safe cars and so to

equip his cars as to minimize the dangers of the employment, it has also a right to pass such a statute as this, assuming that its effect will be to increase the diligence of the carrier in the employment of good servants and the furnishing of good machinery, works and ways.

The trouble with this argument is that it leads us far afield. An accident may happen on a railroad by the breaking of a rail; if you are to make the carrier liable to his employe for the breaking of this rail, why not include in this liability the manufacturer of the rail? An accident may happen by the breaking of a steel axle under a car; why not extend the liability to the manufacturer of the car? And as this car manufacturer gets this steel axle from a manufacturer of steel, why not extend the liability to him? In each of these cases it will likewise have a tendency to make the cars and axles better if all the employes in the car shop and steel plant are made liable for negligence to the injured employes of the carrier.

The vice in this argument is that the negligence of the servant of a carrier, concerning a matter which is not embraced within any rule enacted by Congress for the regulation of commerce, has an indirect and remote and not a direct and immediate effect upon interstate commerce. And this has been the test in a multitude of cases; that is, is the law one which has a direct and positive effect upon interstate commerce, or one which has merely an indirect and remote effect upon interstate commerce? So that if we judge this law by the same tests which have been applied to the laws of the States we will find that it is not a regulation of interstate commerce at all and has only a most indirect and remote relation to interstate commerce.

Cases in Which State Laws Have Been Held Valid nutil Congress Shall Act.

In Smith vs. Alabama, 124 U. S. 465, a law of Alabama was held constitutional which required an engineer to be licensed by State authority, even though in that case the engineer was managing a locomotive drawing an interstate train. In Nashville, etc., Ry. vs. Alabama, 128 U. S. 96, a law of Alabama requiring such engineers to be examined with respect to color blindness, was held constitutional. In both of these cases it is said that such laws are valid in the absence of Congressional legislation on the subject. If we assume that the Safety Appliance Act is constitutional (and it was so assumed in Johnson vs. Southern Pacific Co., 196 U. S. 1) it might be difficult to deny to Congress the right to pass laws similar to those involved in these two Alabama cases, provided such laws were limited to employes engaged in interstate commerce. But a law requiring an engineer to be licensed or requiring an engineer to be examined with respect to color blindness, is a rule to govern transportation and very different from the scope of the act now under consideration.

Again, there is a series of cases in the Supreme Court upon the right of a State to fix the liability of a carrier for negligence in the carriage of persons and property. The leading case is that of Chicago, Milwaukee & St. Paul Ry. vs. Solan, 169 U. S. 133. In that case a person attendant upon a shipment of cattle, on a trip from Iowa to Illinois, was injured in Iowa. The contract for shipment provided that the amount of recovery by such attendant for any damage suffered on the trip should be limited to five hundred dollars. There was a statute of Iowa which provided that a railroad company should not limit its liability for

negligence in the carriage of passengers. It was held that this act, in the absence of Congressional legislation, was valid. We make the following extract from that case:

> " Railroad corporations, like all other corporations and persons, doing business within the territorial jurisdiction of a State, are subject to its law. It is in the law of the State, that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a State, to the protection of that State, as those who travel on domestic trains. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable, according to the law of the State, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the State has the power to redress and to punish. The rules prescribed for the construction of railroads and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations

of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits.

" Such are the grounds upon which it has been held to be within the power of the State to require the engineers and other persons, engaged in the driving or management of all railroad trains passing through the State, to submit to an examination by a local board as to their fitness for their positions; or to prescribe the mode of heating passenger cars in such trains.

" The statute now in question, so far as it concerns liability for injuries happening within the State of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty, resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods."

In Pennsylvania R. R. Co. vs. Hughes, 191 U. S. 478, there was involved the shipment of a horse from New York to a party in Pennsylvania, under a bill of lading limiting the liability, in case of accident, to a fixed sum. The bill of

lading was valid under the law of New York, but invalid under the law of Pennsylvania. The horse was injured in Pennsylvania. It was held that the plaintiff could recover the full value. The court said:

> "It may be assumed that under the broad power conferred upon Congress over interstate commerce, as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation."

To the same effect is Martin vs. P. & L. E. R. R. Co. 203 U. S. In this case the court held valid a statute of Pennsylvania providing that when any person shall sustain an injury while lawfully engaged in any work on the premises of a railroad company he shall recover only as an employe of such railroad could recover.

In Central of Georgia Railway vs. Murphey, 196 U. S. 194, the court held that the imposition by a State statute, upon the initial or any connecting carrier, of the duty of tracing the freight and informing the shipper, in writing, when, where, how and by which carrier the freight was lost, damaged or destroyed, and of giving the names of the parties, and their official position, if any, by whom the truth of the facts set out in the information can be established, is, when applied to interstate commerce, a violation of the commerce clause of the Federal Constitution, and, therefore, certain sections of the Code of Georgia, imposing such a duty on common carriers, were void as to shipments made from points in Georgia to other States.

Congress has assumed the power to fix liability for the transportation of property, as will be seen by the following quotation from Section 20 of the Hepburn Bill as amended:

> "That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contracts, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

But all these cases only go to show that Congress has the right to make a rule which shall govern transportation, such rule being direct and positive, pointed to that end. There is certainly a marked difference between a rule governing a carrier in interstate transportation of passengers or property, and a general law such as this, imposing a liability on the carrier, to his employe, for negligence. The one is direct and positive in its bearing upon and relation to interstate commerce; the other is indirect and remote in its bearing upon commerce of any kind.

Power of Congress over Commerce on Water.

There is, however, a large body of Congressional legislation to which attention must be called, and that is in relation to the transportation of persons and property by water.

Licenses are required for pilots, captains and other commanding officers; minute provisions are made, insuring the comfort and safety of passengers and crew; boilers of steam vessels are required to be inspected; life preservers, life boats and other apparatus necessary in case of disaster, are required to be furnished. There are also statutory regulations as to the liability of such carriers; they are not to be liable in case of fire, in the absence of negligence; nor are they to be liable for the value of such articles of great intrinsic worth, as gold, bullion, silks and other similar property, unless the character of the property is stated in the bill of lading. Again, the owners of vessels, either navigating the high seas or the navigable waters of the United States, are not liable for the negligence of the master and crew beyond the value of the ship and its freight; and as to vessels navigating the high seas and Great Lakes, the owners are not liable at all, speaking broadly, if they provide a seaworthy vessel, proper apparatus and a competent master and crew. This limitation upon liability applies to negligence causing personal injury or death, as well as injury to goods. Butler vs. Boston Steamship Co., 130 U. S. 548. Craig vs. Continental Insurance Co., 141 U. S. 644.

There are two powers to which such laws as these can be referred. One is Section 3 of Article VIII of the Constitution, which is the commerce clause. The other is Section 2 of Article III, which reads: "The judicial power shall extend to all cases of admiralty and maritime jurisdiction." It can not be denied that the Supreme Court has said on more than one occasion that these various enactments are justified by the commerce clause. A case, however, finally reached the Supreme Court, Butler vs. Boston Steamship Co., 130 U. S. 527, where the law of limited liability was

challenged as not being applicable to an action under a Massachusetts statute for negligently causing the death of a passenger; the stranding, sinking and total loss of the steamship having occurred on Devil's Bridge, near Gay Head, at the western extremity of Martha's Vineyard and near the mouth of Vineyard Sound, that being within the territorial limits of the State of Massachusetts. The court held that the law of limited liability was enacted by Congress as a part of the maritime law of this country and it was therefore co-extensive in its operation with the whole territorial domain of that law. The court further said that " whilst the general maritime law, with slight modifications, is accepted as law in this country, it is subject to such amendments as Congress may see fit to adopt. One of the modifications of the maritime law as received here, was a rejection of the law of limited liability. We have rectified that; Congress has restored that article to our maritime code. We can not doubt its power to do this. As the Constitution extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction, and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the National legislature and not in the State legislature."

This matter came up again in Ex parte Garnett, 141 U. S. 1. That was a case where the limited liability was applied to a vessel navigating an inland water between two ports of the same State. Of course this could not be justified under the commerce clause. The court said:

> " It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several States, in order to find authority to pass the law in question. The act of Congress which

limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is co-extensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends."

This paragraph is quoted with approval in Lehigh Valley R. R. vs. Pennsylvania, 145 U. S. 203.

The case of Patterson vs. Barque Eudora, 190 U. S. 170, is one where the court had to consider an Act of Congress of December 21, 1898, making it unlawful in any case to pay a seaman his wages in advance. The seamen had shipped on board the British barque Eudora; had been paid in advance, and on completion of the voyage libeled the Eudora for wages for the full term of service. It was held that they could recover.

In holding this act constitutional the court said:

"Neither do we think there is in it any trespass on the rights of the States. No question is before us as to the applicability of the statute to contracts of sailors for services wholly within the State. We need not determine whether one who contracts to serve on a steamboat between New York and Albany, or between any two places within the limits of a State, can avail himself of the privileges of this legislation, for the services contracted for in this case were to be performed beyond the limits of any single State and in an ocean voyage. Contracts with sailors for their services are, as we have seen, exceptional in their character, and may be subjected to special restrictions for the purpose of securing the full and safe carrying on of commerce on the water.

> Being so subject, whenever the contract is for employment in commerce not wholly within the State, legislation enforcing such restrictions comes within the domain of Congress, which is charged with the duty of protecting foreign and interstate commerce."

The cases holding that such an act would be an amendment to the maritime law are not referred to, but it would seem obvious from the whole tenor of the opinion that the commerce clause need not be drawn on to sustain this law. And the discussion of the marked difference between seamen and other classes of the community is specially pertinent to a matter of maritime jurisprudence.

In Robertson vs. Baldwin, 165 U. S. 275, the principal authority relied on, the court had under consideration the Act of Congress allowing the arrest of deserters by magistrates and their return to the vessels upon which they had shipped. It was contended that this was in violation of the Thirteenth Amendment. The court rejected the contention. It did not intimate under what clause of the Constitution the legislation was justified, but here again it would seem plain that it was not the commerce but the maritime clause.

That Congress, therefore, could give a right of action to a person injured, whether passenger or employe, in navigation, whether upon the high seas or upon inland waters, would seem to be clear, but that would come from the power of Congress over the maritime law. In the absence of such Congressional enactment, however, courts of admiralty or courts of common law of the United States will administer a State law giving such a remedy. Steamboat Co. vs. Chase, 16 Wall. 522. Sherlock vs. Alling, 93 U. S. 100. *In re* The Harrisburg, 119 U. S. 204. Humboldt Lumber Ass'n vs. Christopherson, 73 F. R. 247.

But this power of Congress to pass an act under the maritime law, in no way aids the statute now under consideration, and this statute must find its entire support in the commerce clause.

Distinction Between Navigation on High Seas and Inland Waters and Transportation by Land.

That a very different proposition presents itself when we come to consider enactments in reference to land transportation, from that which presents itself when we consider enactments in reference to navigation, is clear from the authorities.

This distinction is noticed in The Daniel Ball, 10 Wall. 557, although the court in that case did hold that under the power to regulate commerce the United States had the right to require The Daniel Ball to take out a license and to submit to the inspection laws of the United States, even though its voyage was limited to Grand River and between points on that river entirely within the State of Michigan. It appeared that The Daniel Ball carried freight which was marked for a destination beyond the terminus of its own route.

Here we may mark a distinction between land transportation and navigation as illustrated by a comparison between United States vs. Geddes, 131 F. R. 452, and The Daniel Ball, 10 Wall. 557. In United States vs. Geddes, the railroad, wholly within the State of Ohio, carried freight marked for points outside of Ohio. It was held that this did not render the railroad amenable to the Safety Appliance Act. The difference between the two cases is that Congress has power over all the navigable waters of the United States, they being highways belonging to the

United States, and, therefore, can exercise, under the power to amend the maritime law, full authority over the navigation of all such streams; whereas there is no power in reference to transportation by land which begins and ends in the same State. In The Daniel Ball, 10 Wall. 557, the court, through Mr. Justice Field, said:

> "It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a State, that Congress may take the entire control of the commerce of the country and extend its regulations to the railroads within a State on which grain or fruit is transported to a distant market.
>
> "We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation."

The matter is very fully considered in B. & O. R. R. vs. Maryland, 21 Wall. 456. It would take too much space to give a full extract from the opinion of Mr. Justice Bradley; it will be sufficient to give the following quotation as made with approval by Mr. Justice Gray, in Pullman Palace Car Co. vs. Pennsylvania, 141 U. S. 18, 23:

> "As has been said by this court: 'Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution,

although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land.' Railroad Co. vs. Maryland, 21 Wall. 456, 470."

This distinction is also most forcibly stated by the Court of Appeals of New York in the case of People vs. Knight, 171 N. Y. 354 (64 N. E. 152), this being the same case which was affirmed by the Supreme Court under the style of State of New York vs. Knight, 192 U. S. 21.

We should, we think, call attention to certain dicta on this subject which may be regarded as having a tendency to uphold the constitutionality of the law now under consideration.

The case of Sherlock vs. Alling, 93 U. S. 100, was an action, under an Indiana statute, against the owners of a steamboat causing the death of the plaintiff's intestate through the negligence of the officers of the boat. In the course of his opinion Judge Field says:

"It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and

interstate commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital and other dues they shall be subjected; what rules they shall obey in passing each other; and what provision their owners shall make for the health, safety and comfort of their crews. Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details to guard against accident and consequent loss of life.

"The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of State authority."

Of course this language is to be controlled by the subsequent considered judgments of the Supreme Court of the United States to the effect that the laws herein mentioned find their authority in the admiralty and maritime jurisdiction of the United States rather than in the commerce clause. But aside from this the language used by the court can fairly be construed to mean that Congress has the right to enact rules for the government of transportation and to prescribe a remedy for their violation. Thus limiting the general language used by Mr. Justice Field, it is not in any way inimical to the present argument.

In Pierce vs. Van Dusen, 78 F. R. 693, Mr. Justice Harlan, delivering the opinion of the Circuit Court of Appeals for the Sixth Circuit, applied the Employers' Liability Act of Ohio to a suit by an employe of a receiver. In the course of his opinion, however, he made use of the following expressions:

> "Undoubtedly the whole subject of the liability of interstate railroad companies for the negligence of those in their service may be covered by national legislation enacted by Congress under its power to regulate commerce among the States. But as Congress has not dealt with that subject it is competent for Ohio to declare that an employe of any railroad corporation doing business here, including those engaged in commerce among the States, shall be deemed, in respect to his acts within this State, the superior, not the fellow servant, of other employes under his control."

There is a similar expression in B. & O. R. R. vs. Baugh, 149 U. S. 378. The court there, speaking through Mr. Justice Brewer, said:

> "Further than that it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the States is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution. To-day, the volume of interstate commerce far exceeds the anticipation of those who framed this Constitution, and the main channels through which this interstate commerce passes are the railroads of the country. Congress has legislated in respect to this commerce not merely by the interstate commerce act and its amendments, but also by an act

passed at the last session, requiring the use of automatic couplers on freight cars. The lines of this very plaintiff in error extend into a half dozen or more States, and its trains are largely employed in interstate commerce. As it passes from State to State must the rights, obligations and duties subsisting between it and its employes change at every State line? If to a train running from Baltimore to Chicago, it should, within the limits of the State of Ohio, attach a car, for a distance only within that State, ought the law controlling the relations of a brakeman on that car to the company to be different from that subsisting between the brakeman on the through cars and the company? Whatever may be accomplished by statute—and of that we have now nothing to say—it is obvious that the relations between the company and employe are not in any sense of the term local in character, but are of a general nature and to be determined by the general rules of the common law. The question is not local, but general."

Against these dicta, however, we have the right to oppose the famous paragraph on the subject of dicta, in the opinion of Chief Justice Marshall, in Cohens vs. Virginia 6 Wheaton, 399:

" It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles

which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

This sentence was quoted by Mr. Justice Curtis in his opinion in Carroll vs. Lessees of Carroll, 16 How. 275, 287; in Northern Bank of Toledo vs. Porter, 110 U. S. 608, by Mr. Justice Harlan, at page 615; in Leisy vs. Hardin, 135 U. S. 100, 135, in the dissenting opinion delivered by Mr. Justice Gray, concurred in by Mr. Justice Harlan and Mr. Justice Brewer; in Pollock vs. Farmers' Loan & Trust Co., 157 U, S. 429, 574, in the opinion of the court delivered by Mr. Chief Justice Fuller; in United States vs. Wong Kim Ark, 169 U. S. 649, 679, in the opinion delivered by Mr. Justice Gray; and in Downes vs. Bidwell, 182 U. S. 244, 258, 259, in the opinion delivered by Mr. Justice Brown.

We repeat that we think it most significant that when State legislation has been attacked in the Supreme Court of the United States as invalid under the Constitution of the United States, because (*a*) it required an express company to be licensed by the State in order that it might carry on an intrastate business; or (*b*) because it taxed the Pullman Company for carrying on an intrastate business; or (*c*) because it taxed a railroad company on its cab service; or (*d*) because it required separate coaches for the races; or (*e*) because it required trains to stop at certain stations; or (*f*) because it required engineers to be licensed; or (*g*) because it required engineers to be examined for color blindness, the argument of counsel and opinion of court have been at once directed to the consideration of the commerce clause of the Constitution. On the other hand, when State legislation has been attacked in the Supreme Court of the United States as invalid because (*a*) it altered the rule

of fellow servant; or (*b*) because it rendered a railroad company liable for stock killed on account of failure to fence; or (*c*) because it rendered a railroad company liable for fire set out without negligence—in no one of these cases, although all of these laws were general in their nature and applicable to interstate as well as intrastate carriers, has the argument of counsel or the opinion of court so much as hinted that these matters have any sort of relation to the commerce clause.

Let us assume that an accident happens to an employe of an interstate carrier in a State where the common law prevails, then in order to render this act constitutional the following will have to be adjudged regulations of interstate commerce: (*a*) A right of action by the employe against the employer for negligence; (*b*) a right of action, even though the negligence was that of a fellow servant; (*c*) a right of action although the employe died after the hurt; (*d*) a right of action although the employe was guilty of contributory negligence; (*e*) a right of action although the employe had, in his contract of employment, relieved the employer from liability.

Assume that the State has passed an act abolishing the *actio personalis* rule, then a recovery by a personal representative could be had but it would be for the benefit of the decedent's estate generally. Is it a regulation of interstate commerce to provide that such recovery shall not be for the benefit of decedent's estate but for the benefit of certain persons named by Congress?

In what imaginable way can the distribution of a recovery for the death of an employe of an interstate carrier affect interstate commerce?

In the Addyston Pipe case the Supreme Court, speaking through Mr. Justice Peckham, again and again declared that

in order to bring a contract under the commerce clause of the Constitution, such contract must be one which "directly and substantially, and not merely indirectly, remotely, incidentally or collaterally" regulates to a greater or less degree, commerce among the States.

Again, "if the necessary, direct and immediate effect of the contract be to violate an act of Congress and also to restrain and regulate interstate commerce, it is manifestly immaterial whether a design so to regulate was or was not in existence when the contract was entered into."

In conclusion, on this branch of the subject, we submit that such an enactment as that of the Employers' Liability Act is not a regulation of interstate commerce or of commerce at all. It falls within the general domain of legislation governing the relation of husband and wife, parent and child, guardian and ward, master and servant, which belongs to the States and can not be invaded by Congressional enactment.

As showing the first impression of a careful writer we quote the following from a note in Judson on Interstate Commerce, page 549:

> "Suits for personal injuries by employes and others against interstate carriers are only incidental to such commerce, and the rights and liabilities of parties in relation thereto are controlled by the law of the State. It is difficult to assign limits to the regulating power of Congress in interstate commerce, if it includes the abrogation of State laws relative to employer and employe, and as to the distribution of estates of decedent employes and the control of the contractual relations between the parties, because of the interstate business of the employer."

As the Act Embraces Intrastate as Well as Interstate Employes, Is the Act Valid?

The next matter of inquiry is, assuming that Congress has power by general enactment to provide that employes engaged in interstate commerce, or their personal representatives, shall have the right of action conferred by this enactment, with the prescribed advantages, because this is a regulation of interstate commerce, yet as this act not only embraces employes engaged in interstate commerce but those not engaged in commerce at all and those engaged in intrastate commerce, is the act in any respect valid?

It would seem that the Supreme Court had fully answered this question.

Cases Holding That Acts Not Separable and Partly Unconstitutional Are Entirely Void.

In United States vs. Reese, 92 U. S. 214, the court had under consideration an act prohibiting discrimination between voters. Reese was indicted for refusing to receive the vote of a citizen of the United States of African descent. The Supreme Court declared that the act, not being confined in its operation to unlawful discrimination on account of race, color or previous condition of servitude, was beyond the limit of the Fifteenth Amendment to the Constitution and not valid. On the question, whether the act could be limited by construction to those persons to whom Congress could lawfully have applied it, the court said:

> " It remains now to consider whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United

States, while exercising the elective franchise, on account of their race, etc.

" There is no attempt in the sections now under consideration to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

" It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the govern-

ment. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.

"We must, therefore, decide that Congress has not as yet provided by appropriate legislation for the punishment of the offense charged in the indictment; and that the Circuit Court properly sustained the demurrers and gave judgment for the defendants."

Again, in Baldwin vs. Franks, 120 U. S. 678, the court had under consideration Section 5519 of the Revised Statutes, prohibiting certain conspiracies. This was declared unconstitutional in United States vs. Harris, 106 U. S. 629, and coming again before the court in the case now under consideration, an effort was made to sustain the statute by limiting it to such conspiracies as Congress could have prohibited. The court said:

"It is now said, however, that in that case the conspiracy charged was by persons in a State against a citizen of the United States and of the State, to deprive him of the protection he was entitled to under the laws of that State, no special rights or privileges arising under the Constitution, laws or treaties of the United States being involved; and it is argued that although the section be invalid, so far as such an offense is concerned, it is good

for the punishment of those who conspire to deprive aliens of the rights guaranteed to them in a State, by the treaties of the United States. In support of this argument reliance is had on the well settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional, rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a State, is not of that character, for in that connection it has no parts within the meaning of the rule. Whether it is separable so that it can be enforced in a Territory, though not in a State, is quite another question, and one we are not now called on to decide. It provides in general terms for the punishment of all who conspire for the purpose of depriving any person or any class of persons of the equal protection of the laws or of equal privileges or immunities under the laws. A single provision which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a State, and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

To the same effect are the following cases:

Virginia Coupon Cases, 114 U. S. 269, 304, 305.
Pollock vs. Farmers' Loan & Trust Co., 158 U. S. 601.
Connolly vs. Union Sewer Pipe Company, 184 U. S. 540.

The most recent case on this subject is that of Illinois Central Railroad Company vs. J. U. McKendree (S. C. December 17, 1906). In that case it appeared that the Secretary of Agriculture, under an act of Congress allowing him to make regulations as to quarantine, had established a line running east and west through the State of Tennessee, and prohibited the shipment of cattle from points south of that line to points north of that line, except under certain conditions. In violation of this rule the Illinois Central shipped certain cattle from a point in Tennessee south of the quarantine line, to a point in Kentucky. Recovery having been had against the Illinois Central on this account, a writ of error was sued out to the Supreme Court. The court reversed the judgment, holding that the regulation of the Department included the shipment of cattle from a point in Tennessee south of the line to another point in Tennessee north of the line; in other words, that the language was general, prohibiting shipments from any point south of the line to any point north of the line. The court held that as the Secretary did not have, and could not have been given, authority to prohibit shipments from one point in the State to another point in the State, and as the language of the regulation was general—including both such shipments and interstate shipments, the whole order was void, and the court could not separate the illegal part from the legal part of such order. Reliance was placed upon the Reese case and the Trademark cases.

Perhaps the most apposite case, however, is that of United States vs. Steffens, commonly called Trademark Cases, 100 U. S. 82. There, the court had under consideration an act of Congress allowing the registry of trademarks. The court said:

> "When, therefore, Congress undertakes to enact a law which can only be valid as a regulation of com-

merce, it is reasonable to expect, on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trades, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress. * * * If, for instance, the statute described persons engaged in a commerce between the different States and related to the use of trademarks in such commerce, it would be evident that Congress believed it was acting under the clause of the Constitution which authorizes it to regulate commerce among the States. So if, when the trademark has been registered, Congress had protected its use on goods sold by a citizen of one State to another, or by a citizen of a foreign State to a citizen of the United States, it would be seen that Congress was at least intending to exercise the power of regulation conferred by that clause of the Constitution. But no such idea is found or suggested in this statute. * * *

"It is therefore manifest that no such distinction is found in the act, but that its broad purpose was to establish a universal system of trademark registration for the benefit of all who had already used a trademark, or who wished to adopt one in the future, without regard to the character of the trade to which it was to be applied, or the residence of the owner, with the solitary exception that those who resided in foreign countries which extended no such privileges to us were excluded from them here.

"It has been suggested that if Congress has power to regulate trademarks used in commerce with foreign

nations and among the several States, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: First, the indictments in these cases do not show that the trademarks which are wrongfully used were trademarks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part, where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

The court then quotes and relies upon that part of the opinion in United States vs. Reese, 92 U. S. 214, which we have above quoted.

In the present act there is no distinction made between employes engaged in interstate commerce and those not engaged in commerce at all, or engaged in intrastate commerce. The language is plain and it is impossible to say that it applies to one class of employes rather than to another. It applies equally to all. There is no effort made to distinguish between the one and the other.

Let us here notice again a sentence from the Trademark Cases, which we have quoted above: "If, for instance, the statute described persons engaged in commerce between the different States, and related to the use of trademarks in such commerce, it would be evident that Congress believed it was acting under the clause of the Constitution which authorized it to regulate commerce among the States."

This shows that it is not sufficient to describe persons engaged in commerce between the different States and then attempt to regulate all of the commerce of such persons, but the act must apply to that part of the commerce of such persons as is interstate. It is obvious that if, because Congress had not the power to embrace in this enactment employes not engaged in commerce or engaged in intrastate commerce, a court can properly, by construction, limit the terms of the act to employes engaged in interstate commerce—by the same sign, if Congress had the power to apply this enactment to employes engaged in intrastate commerce, or not engaged in commerce at all, and did not have the power to apply it to employes engaged in interstate commerce, the courts could, by construction, limit the act to employes engaged in intrastate commerce or not engaged in commerce at all. This is to say that whenever a court comes to consider an act passed by the Federal Congress or by a State legislature, it must first determine what sort of an act was within the power of the enacting body, and then, assuming that this was the act desired to be passed, limit it accordingly.

But this view has no place in constitutional law. The courts are bound to take laws as they find them, and have no right to assume that the legislature would have passed a law other than the one it has passed. So here, if this enactment is valid as to employes engaged in interstate commerce, of course it displaces, in that respect, all State enactments on the subject. It determines when employes engaged in interstate commerce can recover for negligence, while other employes of the same employer are governed by entirely different rules.

We have seen that laws have been passed in many States giving to a personal representative of one who dies

of a hurt negligently inflicted the right to recover damages, that these laws further provide how such damages shall be distributed and that in very many cases this distribution is substantially different from that provided in the Congressional enactment. Can it be assumed that Congress meant to single out one class of employes from the great mass of employes, and to provide that as to them there should be one fellow servant rule, one rule of contributory neglect, while as to other employes there should be another rule, viz., that prescribed by the law of the State in which the accident happened?

We can imagine no greater confusion in the law of negligence than would result from such legislation. In very many cases it would be impossible for the employe or his employer to know by what law their relations were governed.

We submit, therefore, that it is impossible to say that Congress intended any such result. The language of the act gives no warrant for such application. It embraces plainly every employe of every interstate carrier, without regard to the nature of his employment. To reduce it to the constitutional limit will be not to construe the law but to make an entirely new one.

A striking case on this subject is that of Ballard vs. Mississippi Cotton Oil Company, 81 Miss. 507; 34 Southern 533. In that case the court had under consideration an act of the legislature of Mississippi, which provided that:

> " Every employe of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the act or omission of said corporation or its employes, as are allowed by law to other persons not employes, where the injury results from the negligence of a superior agent or officer; or of a person having a right to

> control or direct the services of the party injured; and also when the injury results from the negligence of a fellow servant,"

etc., and that knowledge of defective appliance, etc., shall constitute no defense.

The court held that inasmuch as the act imposed restrictions on all corporations, without reference to any differences arising out of the nature of their business, not imposed on natural persons, therefore the act denied to corporations the equal protection of the law.

The court further held that the act could not be held constitutional by construing it to apply only to corporations engaged in hazardous business, and by permitting the court in each case to determine from the proof whether the particular business engaged in was hazardous. The court declared the true test upon this question to be found in United States vs. Reese, 92 U. S. 220; United States vs. Harris, 106 U. S. 629; Baldwin vs. Franks, 120 U. S. 685, 690. Summing up, the Mississippi court said:

> " There never can be any room for the application of the doctrine as to severing a statute, except in those cases where the constitutional provisions, as well as the unconstitutional provisions, *both* appear on the *face of the statute*, and that, wherever a court has to *insert* in a statute words or provisions *not put* there by the *legislature*, it is guilty simply of judicial legislation."

We have thus far discussed the question whether it is competent for Congress to apply legislation of this character to all employes of an interstate carrier, even such employes as are not engaged in commerce or are engaged in intrastate commerce; and whether such an enactment as this, even

limited to employes of interstate carriers where the employes are engaged in interstate commerce, can be considered a regulation of commerce; and whether, assuming that Congress can not apply such an act as this to employes engaged in intrastate commerce or not in commerce at all, and can apply it to such employes as are engaged in interstate commerce, it is possible to sever this act so as to render it constitutional.

Is This Act Valid Under Amendment V?

We now propose to inquire whether this act, if it is within the scope of the commerce power of the Constitution, is yet valid under the restrictions contained in the Fifth Amendment to the Constitution? This Fifth Amendment provides:

> " No person shall be deprived of life, liberty or property without due process of law."

This prohibition is one directed to Congress and not to the State legislature.

The Fourteenth Amendment provides:

> " Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

It is to be observed that there is a difference between these two amendments; the one addressed to the States containing, in addition to the inhibition against depriving any person of life, liberty or property without due process of law contained in both amendments, the further inhibition: " nor deny to any person within its jurisdiction the equal protection of the law."

In Connolly vs. Union Sewer Pipe Company, 184 U. S. 540, the Supreme Court of the United States held the Anti-Trust Law of Illinois unconstitutional because, after prohibiting, in the 1st section, " combinations of capital, skill or acts " by two or more persons, firms or associations, to create or carry out restrictions in trade, by the 9th section it provided that the act should not apply to agricultural products or live stock while in the hands of the producer or raiser. It was held that this act was in violation of that clause of the Fourteenth Amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the law. (Page 557.)

At the conclusion of the opinion it is said:

> " The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the 9th section.
>
> "Whether it is also within the prohibition against the deprivation of property without due process of law is a question which it is unnecessary to consider at this time."

In Murray's Lessee vs. Hoboken Co., 18 How. 276, Mr. Justice Curtis says that the words, " due process of law," as contained in the Fifth Amendment, are undoubtedly intended to convey the same meaning as the words, " by the law of the land," in Magna Charta. He treats the language of the Fifth Amendment, " No person shall be deprived of life, liberty or property, without due process of law," as equivalent to the words of Magna Charta, which declare that " no person shall be deprived of his life, liberty or property but by the judgment of his peers or the law of the land."

In County of San Mateo vs. Southern Pacific Co., 13 F. R. 150, 151, Mr. Justice Field seems to treat the provisions of the Fifth Amendment as identical with the provisions of the Fourteenth Amendment, except that the one is addressed to Congress and the other to the States.

Assuming, then, that the Fifth Amendment is as broad as the Fourteenth Amendment, in prohibiting what is called class legislation, we proceed to inquire whether this act is one which can be properly denominated class legislation.

There is no doubt that the act applies to all employes of all common carriers engaged in interstate commerce. That it was not meant to apply alone to railroads appears from the 5th section, where there is a special provision in regard to the duty of common carriers by railroad.

Again, this act, as passed by the House of Representatives, was confined to railroad companies, but a reference to the debates in the Senate (40 Congressional Record, 7843 to 7846) will show that the words " by railroad " were, by amendment on the floor of the Senate, struck out.

This act can not, therefore, be justified as dealing with an employment which is especially hazardous, for there are undoubtedly certain common carriers, none of whose employes are exposed to an unusual hazard; and, again, there are many employes of all common carriers who are not exposed to any peculiar hazard.

In Johnson vs. St. Paul & Topeka R. R., 43 Minn. 222; 8 L. R. A. 419; 45 N. W. 156, the court said:

> " Neither would it relieve the act from the imputation of class legislation that it applies alike to all railroads. It has been sometimes loosely stated that special legislation is not class, ' if all persons brought under its

influence are treated alike under the same conditions.' But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought 'within its influence,' but in its classification it must bring within its influence all who are under the same conditions. Therefore, if a distinction is to be made between railway corporations and other employers as respects their liability to their employes, it must be based upon some differences in the nature of the employment, and can only extend to cases where such difference exists."

Again the court said:

"Therefore, after mature consideration, our conclusion is that, if any limitation is to be placed by the courts upon the application of this statute (and on constitutional grounds there must be), the only one which will furnish any definite or logical rule is to hold that it only applies to those employes who are exposed to the peculiar hazard incident to the use and operation of railroads and whose injuries are the result of such dangers."

An examination of the authorities on the subject of the constitutionality of employers' liability acts develops a most unsatisfactory confusion of opinion. 2 Master and Servant, Labatt, Sections 643, 646.

In Georgia such legislation seems to be held to be constitutional as applied to all railroad employes. See same authority, Section 756, note, where these instances are given: Injury received by piece of timber falling on servant working in shop; injury received in putting a line of gas pipe on the ceiling of a car shop.

The best discussion of the statutes of Wisconsin, Minnesota, Kansas, Iowa, Georgia and Missouri, dealing with the liability of a railroad to its employes under fellow servant laws, which has come under our notice, is contained in the case of Callahan vs. St. Louis Merchants' Bridge Terminal Company, 170 Mo. 473; 60 L. R. A. 249; 71 S. W. 208.

In later years many of the States have substituted for these older statutes, which were applicable to railroads, general laws defining and limiting the fellow servant rule. When the Supreme Court has had under consideration these older statutes it has always taken them with a construction fixed upon them by the highest court of the State from which the case has come; and, therefore, has not had occasion to determine what would be its judgment upon the constitutionality of these statutes if it were at liberty to take them as they were written. In other words, the State courts have construed their statutes in such a way as to confine them, in their application, to employments in their nature hazardous. The Supreme Court of the United States has, therefore, been bound to assume that these statutes were so written.

For the first time, then, there will come before the Supreme Court an act of Congress, the meaning of which it must ascertain and from such meaning determine whether it is or is not within the prohibition of the Fifth Amendment.

Here, then, is a statute which applies to common carriers a rule of liability as to their employes entirely different from that which is applied to the employes of other individuals and corporations engaged in interstate commerce. Not only is a right of action given to every such employe of every such common carrier but, as we have seen above, the doctrine of fellow servant is abolished; also the doctrine of contributory neglect radically changed; and also the right

of an employe and employer to agree upon the terms of employment, denied. We also know that these rules are applied to a vast army of persons who are not engaged in any hazardous employment. No rule is laid down which the common carrier must observe in dealing with his employes. There is no requirement that in order to render the employe safe in the performance of his duties the carrier shall do any particular thing; but a penalty or burden is put upon an interstate common carrier, in his relations to his employe, not put upon any other person or corporation engaged in interstate commerce.

The two leading cases in the Supreme Court of the United States, on the subject of class legislation, are Gulf, Colorado & Santa Fe R. R. vs. Ellis, 165 U. S. 151; and Atchison & Topeka R. R. vs. Matthews, 174 U. S. 96. The opinion in each of these cases is delivered by Mr. Justice Brewer. In the first case a Texas statute was held unconstitutional; and, in the second case, a Kansas statute was held constitutional.

In the first case, the Texas statute had provided that any person in Texas having a valid, bona fide claim for personal services rendered, or labor done, or for damages, or for overcharges of freight, or claims for stock killed or injured by the train of any railway company, the amount of which did not exceed $50.00, might present the same for payment, and if the claim was not paid within a certain period after its presentation, the claimant was allowed to institute suit immediately, and if he should establish his claim, he should be entitled to recover the amount and all costs, and in addition thereto a reasonable attorney's fee not to exceed $10.00.

The court held this statute invalid upon the ground that it subjected a railroad company to a penalty not imposed upon other litigants, that it was tantamount to saying to a

railroad company, If you do not promptly pay your debts, or if you dispute your liability, there shall be assessed against you, if it turns out that the claimant is right, not only a judgment for his claim and costs, but also a penalty. The court held that this was subjecting a railroad company to a demand not exacted of other persons or corporations, and, therefore, that the act denied to the railroad company the equal protection of the laws.

At pages 161 and following, the court cites the decisions of various State tribunals holding that acts which imposed burdens or penalties upon certain persons for failing to perform their ordinary duties or obligations, in contradistinction to a failure to perform some regulation specially imposed by the legislature upon the conduct of their business, were invalid.

The second case, Atchison, Topeka, etc., R. R. Company vs. Matthews, 174 U. S., was a case where the State of Kansas had passed an act providing that in actions against a railway company for damages by fire, caused by the operation of the railroad, it should be only necessary to establish the fact that the fire complained of was caused by the operation of the railroad, and the amount of the damages, which proof should be prima facie evidence of negligence on the part of the railroad; and that in all actions commenced under this act, if the plaintiff should recover, there should be allowed him by the court a reasonable attorney's fee, which should become a part of the judgment.

The court held that this statute was constitutional, upon the distinct ground that here was a regulation made by the legislature in regard to the operation of a railroad and the consequences following the failure to observe such regulation. In this way Mr. Justice Brewer distinguishes the second case from the first. The judges who dissented from

Mr. Justice Brewer in the second case insisted that it was governed by the Ellis case, and that in both instances the statutes should be declared unconstitutional because in neither was the penalty exacted for the violation of any regulation made by the State covering the operation of the railroad, but in both cases there was simply a penalty inflicted upon the railroad for its failure to perform a duty laid upon it, not by any special regulation but by the law of the land.

If this explanation of these two cases is a correct one, then it follows that the principle governing both cases is this: It is competent for Congress or a State legislature to provide reasonable regulations for the conduct of interstate or intrastate commerce by railroads, and to further provide for the consequences of the failure of such railroads to observe the regulations; but it is not competent for Congress or for the State to single out either railroads or common carriers and, in the absence of any specific regulation in regard to their duties, impose upon them a liability not imposed upon other persons or corporations similarly situated.

If this is not true then it must follow that Congress has the right to pick out any class of individuals and corporations carrying on an interstate commerce business, and without providing any appropriate regulations for the conduct of such business, impose upon those engaged therein liabilities which are not imposed upon other individuals or corporations carrying on an interstate commerce business, and that such liabilities may be imposed without any regard to whether such interstate business is essentially different from that carried on by other individuals or corporations in the matter dealt with by the terms of the act.

Without any regard, therefore, to whether a particular character of interstate business is hazardous or non-hazard-

ous; without any regard, therefore, to whether the employes of one carrying on interstate commerce of a particular character are, or are not, exposed to perils peculiar to the business, Congress can arbitrarily say that there shall be one rule of negligence, of fellow servant and of contributory neglect, for one class of persons or corporations carrying on the business of interstate commerce, and an entirely different rule as to another class of persons or corporations carrying on the business of interstate commerce.

It would seem that we were here traveling along a different road but again reaching the same place. Indeed, it is hard to get away from the proposition that the power of Congress is limited to prescribing rules for traffic or rules for transportation and providing penalties for the infraction of these rules. An effort upon the part of Congress to assume a general power of legislation over those engaged in interstate commerce rather than over the interstate commerce in which they are engaged, inevitably leads to constitutional difficulties which, to our mind, are insuperable. We therefore express the opinion that the act under consideration is invalid.

PART II.

CONSTRUCTION OF THE ACT.

If, however, this act should be held valid, certain very important questions will arise in its interpretation. It will also be of interest to suggest certain questions of practice, as well as questions arising in the trial of the case and determining when a cause can be removed from the State Court to the Federal Court, and what right of appeal is given to the Supreme Court of the United States in the event of adverse judgment.

Section Two of the act will first be considered.

What Change is Made in the Doctrine of Contributory negligence?

Section Two of the act apparently introduces certain new features in negligence cases. It is thought, therefore, that it might be valuable to attempt to determine in what manner, if any, this section alters the principles of common law.

It will be the object of this subdivision to attempt to determine the respective rights and liabilities of common carriers and employes as created or limited under the provisions contained in this section. Such section reads as follows:

> "That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employe, or where such injuries have resulted

in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. All questions of negligence and contributory negligence shall be for the jury."

The legal effect of the above language, perhaps, can be best considered by separating the section into three parts, and by attempting in the first instance an analysis of each of such parts without considering the effect which the remaining language of the section may have upon such part. For this purpose, the section will be segregated as follows:

(A) That in all actions hereafter brought against any common carrier to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison.

(B) But the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.

(C) All questions of negligence and contributory negligence shall be for the jury.

The above division of the language of the section is made upon the supposition that Subdivision A is intended to prescribe a rule of liability; that Subdivision B is intended to prescribe a rule for determining damages; and that Subdivision C is intended to prescribe a rule for the purpose of determining questions of fact.

In what respect does Subdivision A make a change, if any, in the common law as applied to torts?

At the common law, in negligence cases, three elements are essential to make up a cause of action:

1. The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains.

2. A failure of the defendant to perform that duty, resulting in injury to the plaintiff.

3. The observance by the plaintiff of a duty to protect himself.

McAndrews vs. Chicago, Lake Shore & Eastern Ry. Co., 222 Ill. 232.
Pomeroy on Damages, 2d Ed. 453.

Therefore, in all cases of alleged legal liability, based upon negligence, we must first determine what constitutes the duty of the defendant and what constitutes a failure to perform such duty.

The assumption of the existence of a legal duty to protect from injury necessarily implies the existence of a legal standard of care owing from the defendant to the plaintiff; for unless such standard of care be established it will be impossible to determine whether such legal duty has been violated. Or, in other words, the essence of the duty being the exercise of care, without such standard it would be impossible to determine what acts of omission or commission constitute absence of care or negligence. Were the acts, which should go to make up this standard of care required of the defendant, capable in every instance of absolute and categorical statement, then the problem of determining negligence would be simple, for in such instance proof that the defendant had failed to perform these acts would, of course, be proof of negligence.

It is apparent, however, that the degree or standard of care owing from one to another must necessarily be relative in character, depending upon, as Pomeroy calls them, the primary rights and primary duties of each.

Furthermore, these primary rights and duties must necessarily be varied in each instance by a thousand and one circumstances that affect the relative contractual or physical relations of the parties. In consequence, the law has found it impossible, with the exception of a few instances, to declare specifically what course of conduct shall be evidence of legal care, or, as stated more commonly, what course of conduct shall be evidence of a want of such care and shall constitute negligence. Cooley, in his work on Torts, 3d Edition, p. 1324, speaks as follows:

> "*For negligence, in a legal sense, is no more nor less than this: The failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury.* Some writers classify negligence as gross negligence, ordinary negligence, and slight negligence; but this classification only indicates this: That under the special circumstances great care and caution were required, or only ordinary care, or only slight care. *If the care demanded was not exercised the case is one of negligence, and a legal liability is made out when the failure is shown. 'There are no degrees of negligence; there are degrees of care, and the failure to exercise the proper degree of care is negligence.'*"

See, also, Fox vs. Oakland Con. St. Ry. Co., 118 Cal. 55.
Wikberg vs. Olson Co., 138 Cal. 479.
Note that Cooley says:

> "There are no degrees of negligence; there are degrees of care, and the failure to exercise the proper degree of care is negligence."

The common law looked at the facts for the purpose only of determining liability, that is legal negligence, which,

of course, is only the absence of a legal standard of care; in other words, a negative rather than a positive characteristic. Liability once being determined, it was of no legal consequence how far the legal standard of care had been departed from; for, irrespective of such conditions, the legal fault continued to remain only negligence, and since there was no apportionment or measure of damages based upon comparative degrees of negligence, that is, on the degree of departure by either party from a legal standard of care as compared with the degree of departure of the other party, the law in determining the issues had no need to find else than negligence. Hence, in determining the legal relations between the plaintiff and defendant, it was an anomaly to speak of slight, ordinary or gross negligence. This confusion doubtless arose because the earlier authorities assumed the existence of three general standards of care, called slight, ordinary and great care. In consequence, the failure to observe slight care was called gross negligence, and the failure to observe great care was called slight negligence, though, in fact, each want of observance from the standpoint of the violation of a legal duty, was simply legal fault or negligence as such.

If the above analysis be correct, it may aid in determining the true interpretation to be placed upon the words " slight " and " gross " as applied to negligence in Section Two of the act under consideration.

In the great majority of cases it is not possible to so marshal the facts that it can be stated as a matter of law what the legal standard of care should have been under such facts; in consequence it is also impossible to state in the majority of cases, as a matter of law, whether a given set of facts shows negligence or not.

It becomes apparent, then, that in every case it is necessary to determine as an ultimate fact whether the evidence shows that the conduct of a party has fallen, or not within a legal standard of care, and since this is a matter of

fact and not of law, the law can only apply a legal category for this purpose.

This rule of law is academic and fundamental, viz.: This legal standard is stated to be: "The exercise of such care as a reasonably prudent man would be presumed to exercise under like circumstances;" or stated again: A failure in the legal standard of care is: "The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of most affairs, would do." (Blythe vs. Birmingham Water Works, 11 Ex. 781, at 784.)

This duty of care from an absolute standpoint may sometimes be great; it may be ordinary; it may be slight. From a relative standpoint, however, it is always the duty to exercise "ordinary care," that is, such care as all men of reasonable prudence ought to exercise under like circumstances. It was doubtless the confusion of these absolute and relative standards of care that lead the courts to assume that in some instances "ordinary care" was not the legal criterion for determining liability; and, therefore, where the absolute standard of care was of the highest degree of practicable care, as in the case of carrier and passenger, the departure from this standard was misnamed gross negligence, though, in fact, from the standpoint of liability only, it was but negligence or want of ordinary care. *The absence of this degree of ordinary care (measured by the legal category) on the part of the defendant in protecting the plaintiff from injury constitutes negligence in law.*

One further principle, however, it is essential to apply before it is possible to determine whether such negligence becomes actionable negligence, that is, before a failure in such legal duty makes the defendant liable to the plaintiff in damages.

This principle is, that the failure on the part of the defendant in his legal duty shall make him liable to the plaintiff for any injury done to the plaintiff by the defend-

ant's failure in such respect, unless it shall also appear that the plaintiff, in regulating his own conduct, had failed to exercise the same legal standard of care, having for its object a regard for his own safety.

Cooley, 3d Edition, p. 1438; also pp. 1414, 1415 and 1440.
Rathburn vs. Payne, 19 Wendell 399.

Thus it follows under the above authorities, assuming for our purpose that an injury has been inflicted, that actionable negligence is based upon the following conditions:

1. The existence of a legal duty owing from one person to protect another from injury or to refrain from injuring him.

2. The failure of the person upon whom such duty devolved to observe a legal standard of care arising by virtue of the existence of such duty.

3. The observance by the party injured of a duty also based upon the same legal standard of care to protect himself.

These preliminary comments on the principles of the common law have been made for the purpose of determining in what respects, if any, the language of Section Two establishes rules of law in negligence cases which are a departure from the above principles.

Subdivision A.

This subdivision reads, as to the rule of liability, as follows:

> "Contributory negligence shall not bar a recovery where his (the employe's) contributory negligence was slight and that of the employer was gross in comparison."

That it was not the intention of the above language to abolish all legal standards of care is apparent at once, for contributory negligence remains a bar under certain circumstances, that is, where the plaintiff's negligence is not slight and the defendant's negligence is not gross in comparison.

In determining liability under this section, is there, then, a new feature added to the common law, viz., the necessity only not of finding whether there has been a departure by each party from the legal standard of care required of him, but also of finding the degree of departure by each, in order that it may be determined whether in a particular instance the plaintiff's negligence was slight and that of the defendant was gross in comparison? In other words, are the terms "slight" and "gross" negligence now to be used in the sense of measuring degrees of departure from standards of care used to test liability, or are they to be used in the sense of departure only from absolute standards of care, such as great, ordinary and slight care, terms which are not used relatively at common law as standards of liability, and hence are not tests of liability. If used in the former sense, true comparative negligence is a test of liability. If used in the latter sense, true comparative negligence is not a test of liability.

The above proposition, if not clear at present, may, perhaps, be demonstrated by an examination of the authorities.

Subdivision A being, presumably, a modification of the common law, in interpreting its language we are, of course, entitled to look to the decisions of the common law as the best means of giving it its proper meaning.

It is commonly stated that Section Two was intended to re-establish what was at one time known as the " Doctrine of Comparative Negligence." This doctrine seems to have flourished effectively in Illinois only, though there are suggestions of it in the States of Georgia, Tennessee and Kansas.

We shall, therefore, take the liberty of examining in the first instance the Illinois authorities for the purpose of determining what this so-called doctrine of comparative negligence was supposed to be.

It has been assumed that the doctrine of comparative negligence contained certain principles that were a modification of the common law rules stated above as applicable to torts. It will appear, however, that the courts which laid down its principles were not aware that they were in any manner altering the law of negligence as developed by the English decisions.

The earliest decision on the subject in the State of Illinois is found in the case of Galena & Chicago Union R. R. Co. vs. Jacobs, 20 Ill. 478, decided in the year 1858. In this case, Breese, J., quotes at great length from the fundamental English decisions, laying down the rules of common law on the question of negligence and contributory negligence.

In reaching its conclusions in this case, the court took the position, in accord with all the fundamental English cases examined by it, that if the plaintiff failed to exercise ordinary care his recovery was barred; but at the same time, the court, in its analysis of negligence as such, stated that it was relative in character, holding, for instance, that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff. As a result of this conclusion it spoke of slight and gross neg-

ligence, and stated that whenever it appears that the plaintiff's negligence is comparatively slight and that of defendant is gross, the plaintiff should not be deprived of his action, apparently meaning by this, that where the plaintiff had exercised ordinary care and the defendant had not exercised ordinary care, then it necessarily followed that any negligence of which the plaintiff might have been guilty would be slight and that of the defendant gross in comparison.

It would seem from the court's conclusion that it was not its intent to depart from the doctrine of contributory negligence as known to the common law. It seems simply to have laid down in a novel way the ordinary rule defining legal standards of care. Cooley on Torts, 3rd Ed., p. 1448, for instance, comments upon the above case as follows:

> "But was not this equivalent, in the mind of the judge, to saying that if the defendant is chargeable with the want of ordinary care, and the plaintiff is not, the latter may recover, notwithstanding that a higher degree of care might have prevented the injury."

In any event, Breese, apparently, did not intend to state, in laying down his doctrine of comparative negligence, that the plaintiff who had failed to exercise ordinary care could recover.

The subsequent decisions of the Supreme Court of Illinois show clearly that it did not regard this as his intention, and did not regard such a proposition as essential to the doctrine of comparative negligence.

For instance, in the case of C. B. &. Q. R. R. Co. vs. Lee, 68 Ill. 576, the trial court in its instruction stated the usual principle that the plaintiff could not recover unless he was in the exercise of ordinary care, and then added:

> "Unless the negligence of the defendant was greater than plaintiff's."

On appeal it was held that it had never been the law that the plaintiff could recover simply because the defendant was guilty of greater negligence in that which produced the injury, and the court lays down the recognized rule that it is an essential element to the right of action in all cases that the plaintiff, or party injured, must himself have exercised ordinary care such as a reasonably prudent person would always adopt for the security of his person or property, citing numerous Illinois cases.

This decision is significant as showing that under the comparative negligence rule, the comparison of the acts of parties for the purpose of determining whether the defendant had exhibited a more flagrant disregard of his duty than the plaintiff had of the duty owing to himself, was not at all the basis of liability.

Again, in the case of R. R. I. & St. L. R. R. Co. vs. Delaney, 82 Ill. 198, the same principle was laid down.

The rule of comparative negligence, as it became finally stated in Illinois, cleared up the confusion that seemed constantly to creep into it, namely; that liability depended alone upon comparing the acts of the parties for the purpose of determining which party had exhibited a more flagrant neglect of duty. It was not the intent of the Illinois Supreme Court to abolish, for the purpose of determining liability, the legal standard of care; and it held, through all its decisions, strongly to the rule that if both parties had violated this legal standard of care there could be no recovery by the plaintiff. An examination of the authorities will disclose that the word "slight," when used in connection with some supposed negligence of the plaintiff, created the assumption that such negligence of the plaintiff had not been so great as to show a want of ordinary care on his part, and that the word "gross," when used in connection with the defendant's negligence, was intended to describe an act of negligence on the part of defendant, which showed a want of such care as the law required of him. In other

words, these adjectives represented in law the extremes of negligence as recognized by law.

Therefore, where the plaintiff was guilty of more than slight negligence, or had violated the standard of care required of him, then it became impossible for the defendant to be guilty of gross negligence in comparison, since negligence is always relative between the parties, and if the plaintiff fails in the standard of care required of him, the defendant can not, by comparison, do more than also fail in standard of care. There are, in other words, no degrees in failure of standard of care, and hence no comparison between them, the law being satisfied when it has determined liability.

C. B. & Q. R. R. Co. vs. Warner, 123 Ill. 38.

In the above case, for instance, the court says:

> " He (plaintiff) may have been slightly negligent and yet have observed ordinary care, for the converse of slight negligence is great or extraordinary diligence."

The two decisions of the Illinois Supreme Court which are looked upon as clarifying the doctrine of comparative negligence, as understood in the State of Illinois, and which finally state the principles which govern this doctrine in all its phases, are

C. B. & Q. R. R. Co. vs. Johnson, Admr., 103 Ill. 512, and

Calumet Iron & Steel Co. vs. Martin, 115 Ill. 358.

An instruction by the court below in the first case contained the following clause:

> " But if the jury believe from the evidence that Johnson did not exercise ordinary care, yet that Johnson's negligence was slight and that the negligence of the defendant was gross in comparison with each other, then the plaintiff must recover, and the verdict must be for the plaintiff."

An examination of the opinion of the court will disclose that it reached, in substance, the three following conclusions:

1. That Johnson, if he failed to exercise ordinary care, could not recover, irrespective of the character of the negligence of the defendant.

2. That Johnson could not have been guilty of failing to exercise ordinary care, and at the same time have been guilty of negligence that was slight when compared with the defendant's negligence.

3. That if Johnson did not exercise ordinary care, then it was impossible for defendant's negligence to be gross in comparison with Johnson's negligence.

An analysis of these conclusions will demonstrate at once that the doctrine of comparative negligence was, after all, only a peculiar way of stating common law principles. It will be seen that "slight" and "gross" were used as relative terms; that is, slight negligence meant only that the plaintiff had not failed in observing the care required of him under the common law, viz., such care as an ordinary person, under like circumstances, would have used, and that gross negligence meant merely actionable negligence, or the failure on the part of the defendant to observe such character of care as the law prescribed should be used as the legal standard of care owing from the defendant to the plaintiff; that these terms were used entirely in their legal sense, and not for the purpose of designating comparative degrees of negligence irrespective of legal standards.

The court in each case renders a most elaborate opinion, too extensive to be quoted here. An examination of these cases will give the reader a complete review of the law of comparative negligence as laid down by the Supreme Court of Illinois. Several sentences only are quoted to show the trend of the court's holdings.

In the Johnson case, the court said:

> "Negligence, even when gross, is but an omission of duty."

"The definition of gross negligence itself proves that it is not intended to be the subject of comparison. It is 'the want of slight diligence.' Slight negligence is 'the want of great diligence.'"

"It can not, then, legally be true that where the plaintiff fails to exercise ordinary care, and the defendant is guilty of negligence only, the plaintiff's negligence is slight and that of the defendant gross in comparison with each other."

In the Martin case the issue arose over an instruction which stated that even if the deceased were guilty of slight negligence, there might be a recovery if the defendant was guilty of negligence. Counsel for the defense took the position that in order that the plaintiff might recover, it must appear that the defendant was guilty of *gross* negligence, as distinguished from mere negligence. The court said:

"Within the contemplation of that rule (the rule of comparative negligence), where one has observed ordinary care with reference to the particular circumstances involved, for his personal safety, he has, even if slightly negligent, observed all the care the law requires of him; and where, having observed this care, he is injured by the negligence of another, that other has been guilty of the degree of negligence for which the law charges responsibility. The injured person could do no more to entitle himself to redress, and no higher degree of culpability is essential to the liability of the person causing the injury, and so the two degrees of negligence, if the person observing ordinary care has been at all negligent, when compared with each other, fall within the opposite extremes of negligence, legally considered."

The court said again, in speaking of comparative negligence:

> " No new doctrine was claimed to be announced, but the rule declared was, in effect, claimed to be sanctioned by the spirit and philosophy of the cases reviewed, though not strictly within their letter."

It will thus be seen by the above decisions that it was not the intention of the Illinois courts, in establishing the rule of so-called comparative negligence, to alter in any respect the common law principles controlling liability in actions based on negligence.

It has been said that in the State of Tennessee, the doctrine of comparative negligence obtained in a manner which was a modification of the common law. An analysis, however, of the Tennessee decisions, shows that they, no more than the Illinois decisions, intended to abolish legal standards of care in determining liability. That is, the Tennessee decisions do not hold that liability depends upon merely comparing the plaintiff's negligence with the defendant's negligence on the theory that the plaintiff could recover if his negligence were slighter than that of the defendant.

In Tennessee, the doctrine of so-called comparative negligence seems to have originated in the case of Whirley vs. Whiteman, 1 Head's Reports, 623, decided in 1858. In that case, as in the Jacobs case in Illinois, the judge seems to have used the adjectives " slight" and "gross" as applied to negligence in a relative sense when compared with the rule of ordinary care. The subsequent Tennessee decisions clearly show that such is the attitude of the Supreme Court of that State. See

Railroad vs. Humphreys, 12 Lea, 200.
Railroad vs. Fleming, 14 Lea, 130.
Railroad vs. Fain, 12 Lea, 35.
Railroad vs. Gurley, 12 Lea, 46.

The only distinction between the decisions of that court and the so-called English rule, is that which permits the conduct of the parties to be considered in measuring damages. For instance, in the case of Railroad vs. Fleming, cited above, the court says:

> "The principal difference between our rule and the English rule, as modified by the more recent decisions, is in allowing the damages to be mitigated by the conduct of the injured party."

See, also, to this effect: Railroad vs. Fain, 12 Lea, 35.

An examination of the above decisions will disclose that in the State of Tennessee, as well as in the State of Illinois, comparative negligence did not mean abandoning legal standards of care, and that it was not the intent of either State, in laying down its peculiar rule as to the manner of determining liability, to interpret such rule as being a modification of the common law. In the State of Tennessee the attitude of the court seems to have been that slight negligence and remote cause are synonymous in law. In some cases this principle is undoubtedly true, for in certain respects the doctrine of contributory negligence may be analyzed along the same lines as the doctrine of proximate cause.

See Cooley on Torts, 3d Ed. p. 1452.

Smithwick vs. Hall & Upson Co., 59 Conn. 261, 21 Atl. Rep. 924

St. Louis & S. F. Ry. Co. vs. McLain, 80 Tex. 85, 15 S. W. Rep. 789.

An examination of the Georgia decisions brings the same conclusion, namely: That while slight and gross negligence are spoken of in the decisions of that State, it was not assumed that the common law rule of contributory negligence had been altered. The Georgia decisions are interesting in the present discussion also from another standpoint. Under the Code of that State it is provided

that if the complainant and the agents of the railroad company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to the complainant.

In the case of Americus P. & L. R. Co. vs. Luckie, 13 S. E. Rep. 105, the court, in construing this provision, held that it did not abolish the requirement of ordinary care on the part of the plaintiff. It states that the provision refers to those cases in which the plaintiff could not by the exercise of ordinary care have avoided the consequences of defendant's negligence. It continues, that it is the clear meaning of the law of that State that the plaintiff can never recover in an action for personal injuries, no matter what the negligence of the defendant may be, short of actual wantonness, when the proof shows that he could by ordinary care, after the negligence of the defendant began, or was existing, have avoided the consequences to himself of that negligence.

See, also, on the same subject:

Central of Georgia Ry. Co. vs. Tribble, 112 Ga. 863, 38 S. E. Rep. 356.
Miller vs. Smythe, 95 Ga. 288, 22 S. E. Rep. 532.
Pearce vs. Atlanta Cotton Mills Co., 79 Ga. 782, 4 S. E. Rep. 381.
Georgia R. R. & Banking Co. vs. Berry, 78 Ga. 474, 4 S. E. Rep. 10.
Central R. R. & Banking Co. vs. Smith, 78 Ga. 694, 3 S. E. Rep. 397.
Richmond & D. R. Co. vs. Howard, 79 Ga. 44, 3 S. E. Rep. 426.

Finally, an examination of the Kansas authorities will show that the courts of that State, in holding that the plaintiff's negligence, if slight, will not prevent a recovery, did not intend to abolish the rule of ordinary care. See:

Kansas R. R. Co. vs. Peavy, 29 Kas. 169.
Atchison, etc., R. R. Co. vs. Morgan, 31 Kas. 77.
Atchison, etc., R. R. Co. vs. Henry, 57 Kas. 154.

Let us now examine Subdivision A and read it in the light of the above decisions. Note, in the first instance, that the wording of the section, in so far as it states a rule of liability, might have been taken word for word from the language used by the Supreme Court of Illinois as the stated doctrine of comparative negligence, viz.: "The fact that the employe may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison."

It would seem, then, by a perfect analogy, since this statute pertains to a common law liability, that all that has been said by the Supreme Court of Illinois in interpreting this language ought to be available here. It is, of course, appreciated that the Federal courts, in interpreting the meaning of Federal statutes, are not bound by the decisions of the State Supreme Courts, but in the absence of precedent other than that of the State courts, the decisions of such courts ought to be highly persuasive in giving a legal interpretation to a Federal statute apparently establishing a doctrine recognized already by the Supreme Courts of certain States. Therefore, the decisions of the Illinois, Tennessee and Georgia courts, in interpreting the doctrine of comparative negligence, ought to be available in discovering the meaning of Section Two. If these decisions be followed, it would seem that Subdivision A should be given the following interpretation, viz.:

If the employe, though failing to observe the highest degree of care, still exercise such care as a person of ordinary prudence, having a due regard for his own safety, would be presumed to use under like circumstances, such failure to exercise such highest degree of care shall not bar his recovery, if his employer was guilty of actionable negligence.

If this be the meaning of the language, what result necessarily follows? Why, merely the conclusion that Congress did not intend, in enacting a rule of liability between

common carriers and employes, to alter the common law; that in consequence, the above section, so far as Subdivision A is concerned, is but declaratory of the common law.

This conclusion, however, seems to be too astounding to be correct. Why were the terms "slight" and "gross" negligence used at all? We think the solution can be found in the remaining language of the section, which we have divided into Subdivisions B and C. Let us, then, examine, for this purpose, Subdivision B.

Subdivision B.

> " But the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe."

This language, as contradistinguished from the language of Subdivision A, lays down not a rule of liability, but a rule for the purpose of measuring damages.

Nowhere, under the common law, do we find any principle of this character, it being the well-recognized rule of torts that a plaintiff's negligence is to be considered alone for the purpose of determining whether he is or is not entitled to a right of action, and not with the idea of being used in mitigation of damages. True, an exception to this principle appears to have been advanced by the courts of Tennessee, but the rule there declared seems to be purely judge-made law, and is apparently not traceable to any of the earlier decisions of the common law courts. In Georgia, as we have seen, the same rule is a matter of statute.

There is, however, one branch of the law that may be looked to for the purpose of placing an interpretation upon these words, viz., the admiralty law, or maritime law of the land, as found in the decisions of our Supreme and other Federal courts.

In the admiralty court, it is to be remembered that the judge sits without a jury, and, acting as a chancellor, passes upon both the law and the facts. In consequence, the machinery of these courts is so adjusted that it may be presumed to move with nicer regularity than that of the common law courts. In any event, it appears that, from the earliest English decisions, the judges in admiralty have undertaken to measure, without regard to any stated standards of liability, the relative degrees of negligence of the parties involved in tort cases, and in so doing they have distributed the damages between such parties on a basis of equity.*

In fact, it might be stated that the term "comparative negligence" is used in its own proper sense only when applied to the rules of admiralty law.

The rule above stated was first applied by the United States Supreme Court in the case of the schooner " Katherine " vs. Dickinson, 17 Howard, 170. That was a case of a collision between two vessels, both of which were guilty of fault contributing to the collision. The court reviewed the English decisions and, following the rule laid down by them, divided the damages equally between the litigants. The rule was subsequently applied to cases where both vessels being at fault, only one of them was injured; the injured vessel, in the first case, recovering only one-half of its damages, and in the second, the damages sustained by the two vessels being added together and equally divided, and the vessel whose damages exceeded such one-half recovering the excess of the other vessel.

In the above case, it was said by the court, speaking through Mr. Justice Nelson, that the well settled rule in the English admiralty was to divide the loss, and that, under the circumstances attending these disasters, the court thought

*In connection with the above statement it is of course to be remembered that the right of recovery of damages in tort cases is also often regulated and limited by other rules of admiralty law, the discussion of which would not be germane to the present issue. See, for an excellent discussion of the whole subject, Harvard Law Review, Vol XIX, p. 418 (April 1906).

the rule dividing the loss the most just and equitable and as best tending to induce care and vigilance on both sides in navigation.

It was not until 1890 that the Supreme Court of the United States considered the application of the above rule of admiralty to a personal injury case.

In the case of the steamer "Max Morris," 137 U. S. 1, the Supreme Court passed upon a case of this kind. The facts were found by the lower court, and the question of law involved was certified to the Supreme Court. The Supreme Court first quotes as follows from the certificate of Mr. Justice Blatchford and Judge Wallace:

> "The defendant contends, as a matter of defense to said libel, that the injuries complained of by libelant were caused by his own negligence. The libelant contends that the injuries were occasioned entirely through the fault of the vessel and her officers. The court finds, as a matter of fact, that the injuries to the libelant were occasioned partly through his own negligence and partly through the negligence of the officers of the vessel. It now occurs, as a question of law, whether the libelant, under the above facts, is entitled to a decree for divided damages. On this question the opinions of the judges are in conflict. * * *"

The court then says:

> "The question discussed in the opinions of Judge Brown and Judge Wallace, and presented to us for decision, is whether the libelant was debarred from the recovery of any sum of money, by reason of the fact that his own negligence contributed to the accident, although there was negligence also in the officers of the vessel. * * *"

The court again says:

> " The particular question before us has never been authoritatively passed upon by this court, and is, as stated by the district judge in his opinion, whether, in a court of admiralty, in a case like the present, where personal injuries to the libelant arose from his negligence concurring with that of the vessel, any damages can be awarded, or whether the libel must be dismissed, according to the rule in common law cases. * * * "

The court then comments upon the decisions, laying down the well-recognized rule of admiralty as to division of damages in case of collision. Note, for instance, its quotation from the case of Atlee vs. Northwestern U. Packet Co., 21 Wallace, 389, wherein the court distinguishes between methods of procedure and rules of law in the admiralty courts as compared with those of the common law courts. It says:

> " In this court the course of proceeding is in many respects different, and the rules of decision are different. The mode of pleading is different, the proceedings more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages. In the common law court the defendant must pay all the damages or none. If there has been on the part of the plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or, in other words, when both have been at fault, the entire damages resulting from the collision must be equally divided among the parties. This rule of the admiralty commends itself quite as favorably in its influence in

securing practical justice as the other; and the plaintiff who has the selection of the forum in which he will litigate can not complain of the rule of that forum."

The court then reviews the decision of the lower courts of the United States in regard to personal injuries arising in admiralty, and states that there is a conflict of opinion in such courts. The court then renders its decision as follows:

"All these were cases in admiralty, and were not cases of collision between two vessels. They show an amelioration of the common law rule, and an extension of the admiralty rule in a direction which we think is manifestly just and proper. Contributory negligence, in a case like the present, should not wholly bar recovery. There would have been no injury to the libelant but for the fault of the vessel; and while, on the one hand, the court ought not to give him full compensation for his injury, where he himself was partly in fault, it ought not, on the other hand, to be restrained from saying that the fact of his negligence should not deprive him of all recovery of damages. As stated by the district judge in his opinion in the present case, the more equal distribution of justice, the dictates of humanity, the safety of life and limb and the public good, will be best promoted by holding vessels liable to bear some part of the actual pecuniary loss sustained by the libelant, in a case like the present, where their fault is clear, provided the libelant's fault, though evident, is neither willful, nor gross, nor inexcusable, and where the other circumstances present a strong case for his relief. We think this rule is applicable to all like cases of marine tort, founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the

negligence of the libelant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery."

Since the ruling in this case, of course, it has been the law of the admiralty courts that contributory negligence does not bar a recovery, but is to be considered alone in mitigation of damages. See, notably, Smith vs. Serapis, 49 Fed. Rep. 393.

It is apparent how different the doctrine of comparative negligence, as applied in the admiralty courts, is from the same doctrine as applied in the common law courts, the significant distinction being that the admiralty courts do, as a matter of fact, without regard to legal standards of care, compare relatively the acts of negligence of the two parties and award damages accordingly, whereas such method of comparison, as already shown, has been repeatedly denied by the common law courts as appropriate under the rules of comparative negligence there promulgated. There is, then, under the admiralty decisions no issue as to liability, since there is no legal standard of care, the failure to observe which, on the part of the party injured, will lead the court to declare that irrespective of injuries he shall recover nothing. Each case, in other words, depends solely on its own facts, and upon them alone is based the question of how much or how little it would be equitable to award the libelant in damages. In the above respects, the Admiralty Court sits apparently with all the powers of a Court of Chancery.

Subdivision B, then, in prescribing a rule of damages, finds its counterpart in the principles which govern the judge in admiralty in apportioning damages between the parties.

This being so, when this clause is read in connection with the language appearing in Subdivision A, is it essential

to reach the conclusion that Subdivision A is not to be interpreted in accordance with the meaning placed upon the same language in the common law courts, but is rather to be interpreted under the rules of comparative negligence as applied in the admiralty courts? That is, is it necessary to abandon, in interpreting its language, all legal standards of care used for the purpose of determining liability, and reach the conclusion that in all cases of negligence, where negligence appears on both sides, questions of liability are not at issue? In answer to these propositions, it may be said:

First, that the Tennessee courts found no inconsistency in applying common law principles in connection with the above rule for measuring damages.

Second, that a difficulty has already been found in the language of Subdivision A which makes the above conclusion impracticable; that is, there is a clear implication in its language that in some instances the plaintiff cannot recover; viz., where his contributory negligence is not slight (whatever that may mean, if the rules of common law are not considered), and where, at the same time, the negligence of the defendant is not gross in comparison.

In other words, how will it be possible to apply to the whole langua[illegible] of Subdivisions A and B, read together, the interpretation which the rules of admiralty would place upon it, if it is also to be assumed that it must be read, so far as the question of contributory negligence is concerned, in connection with some legal standard of care which would not permit the plaintiff to recover under certain circumstances?

It would seem, therefore, that the language of Subdivision B, used in connection with Subdivision A, ought to be considered only as modifying the common law rule, by adding to it the provision that where the plaintiff, though exercising ordinary care, failed to exercise the highest degree of care, such failure on his part should be taken into consideration by the jury in mitigation of the damages.

We return, then, to the second alternative presented by us in stating the issues of our argument. The terms slight and gross negligence were intended to compare, not degrees of departure from legal standards of care, for the purpose of testing liability, but to bring into comparison the respective acts of the parties based on absolute standards of care for the purpose of measuring damages. Such a rule would be most equitable in character.

The servant in a certain instance may be entitled to the highest degree of absolute care from his master, but he himself may not have exercised all the care for his own protection that a highly prudent man would have done, and in consequence, by virtue both of his master's legal fault and of his own conduct, he suffers an injury. It would be most appropriate in such a case that the master should not bear all the damages, and that the principles of the Tennessee law and of the Georgia statute should be applied for the purpose of requiring the servant to bear a portion of his damages.

Subdivision C.

It will be asserted, however, that all the above argument falls as soon as consideration is given to the language of our Subdivision C, the final clause of the section. This reads as follows:

> " All questions of negligence and contributory negligence shall be for the jury."

If the above provision be read literally, how will it be possible to have any standards in determining liability, except those of comparison? The jury does not formulate legal principles. It applies them only. If all questions of negligence, then, are for it, how can it do more than compare the acts of the parties? One difficulty, however, confronts such a suggestion. That is, the necessity for still classifying

the cases on the basis of liability and non-liability. This presupposes a rule of law.

Remember that under the admiralty rule the degrees of negligence are not compared for the purpose of determining liability, but simply for the purpose of apportioning damages; that is, in the admiralty court, if the negligence of the parties were equal, there could still be made an equitable apportionment of damages between them, while under the statute, even if the rules of common law are not applicable in determining liability, still some principle must be applied to the facts to reach a conclusion in this respect.

The answer may be offered that when the parties shall be found equally negligent by comparison, the plaintiff can not recover.

But this in itself is the statement of a principle of law. Moreover, it is the very rule laid down by the common law, since each party is there tested by the same standard of care, viz., ordinary care. Finally, how will it be possible to compare, not the acts of the parties, but the degrees of negligence of each, without standards of care? Negligence is an ultimate fact, and, therefore, degrees of negligence must be ultimate facts. Hence, comparison of degrees of negligence is impossible without first finding ultimate facts.

See Trakal vs. Heusner Baking Co., 204 Ill. 182.
Texas, etc., R. R. Co. vs. Murphy, 46 Tex. 356.

The necessity for finding ultimate facts, of course, presupposes the giving of instructions by the court as guides to the jury in reaching its conclusions; for under our judicial system the existence of liability must always be finally determined on a principle of law.

If the above be true, how, then, can it be stated literally that all questions of negligence and contributory negligence shall be for the jury?

It may be said that the above language means that the court shall still instruct the jury as to legal standards of care, leaving always the final determination of liability to the jury. Waiving, for the moment, from consideration the fact that such a contention is equivalent to the admission that the section can not be interpreted according to the rules of the admiralty court, but that one must still look to the common law to find standards for determining negligence, it has a significance which would render the whole section clearly unconstitutional.

It is fundamental that an instruction must lay down a rule of law. It is generally formulated by applying a legal principle to a hypothetical set of facts. If, then, a court could never direct a verdict for the defendant on the ground that contributory negligence, sufficient to bar a recovery, existed as a matter of law, no instruction laying down a standard for determining the existence of contributory negligence could ever have the force of law.

For it is a part of our judicial system that where it must be self-evident that the facts fall within the application of a legal category, the functions of a jury are at an end, and it becomes the duty of the court to apply the law and to declare what the ultimate conclusion must be.

Therefore, to say that all questions of negligence shall be for the jury, is equivalent to saying that no legal categories shall ever be applied to the facts in determining negligence. The jury can not create them, and it would be idle for the judge to formulate them if they are not to have the force of law in the sense that he may apply them to the facts when appropriate, or may require the jury to obey them. In other words, to give such instructions without the power to compel the jury to obey them is not trial by jury; it would make the judge a moderator and would bestow upon the jury all the functions of the court, viz., not only to pass upon the facts, but also to determine whether the law had been properly given it.

The Seventh Amendment to the Constitution of the United States reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

The above amendment to the Constitution of the United States was adopted shortly after the Constitution was adopted, and was intended to guarantee the right of trial by jury as known to the common law. The above constitutional provision makes no reference to the several States of the Union. Therefore, in view of the fact that the Constitution of the United States was a grant of power, rather than a limitation, it is held by the courts that the above provision did not take away from the States the right to provide by constitution or law such methods as they saw fit for the purpose of adjudicating rights between their citizens; that is, there would be nothing in contravention of the principles of the Constitution of the United States for any State Constitution to provide that the legislature might abolish trial by jury in civil cases.

In so far, however, as common law rights are to be enforced under the statutes of the United States, or in its courts, the above amendment is held to be a limitation upon the legislative powers to restrict in any respect the right to have all questions, if subject to adjudication according to the common law, passed upon in a trial by jury as known to the common law.

Twichell vs. Commonwealth of Pennsylvania, 7 Wallace, 321.
Edwards vs. Elliott, et al., 21 Wallace, 557.
Pearson vs. Yewdall, 95 U. S. 294.
Walker vs. Sauvinet, 92 U. S. 90.

Therefore, it becomes apparent, under the above decisions, that Congress, in legislating in regard to the mode of adjudicating rights arising at the common law, must limit its legislative provisions in such a manner that they shall not transcend what is known to the common law as the right of trial by jury.

The fundamental case on the above subject is that of Parsons vs. Bedford, 3 Peters, 433. In this case Justice Story reviews the whole subject, and shows, in most forceful language, what was the intent of the Seventh Amendment. This amendment was passed in 1789. He says, in substance, that it preserved the right of trial by jury as known to the common law, in the sense that all controversies at law, as distinguished from those reviewable in courts of equity and admiralty, must be adjudicated in a common law jury trial as the same existed at the time of the adoption of the amendment.

A significant portion of Justice Story's holding, in the present discussion, is that it shows that the limitations of the Seventh Amendment were not applicable to the admiralty or maritime courts, and that in consequence, in such courts, the methods of adjudicating rights between the parties might take a form which could not be availed of in a common law trial by jury.

See, also, a most interesting discussion of the whole subject in a note in 48 American Decisions, at page 185. See:

Sedgwick on Construction of Statutory and Constitutional Law, 2d Ed. p. 487.
Copp vs. Henniker, 55 N. H. 179.
Kingston vs. Yowle, 48 N. H. 57.
Stillwell vs. Kellogg, 14 Wis. 461.
Mead vs. Walker, 17 Wis. 189.
Time vs. State, 26 Ala. 165.
Koppicus vs. Commissioners of State Capitol, 16 Cal. 248.
Whallon vs. Bancroft, 4 Minn. 109.

Ross vs. Irving, 14 Ill. 171.
Whitehurst vs. Colleen, 53 Ill. 247.
Lake Erie, etc., R. R. Co. vs. Heath, 9 Ind. 558.
Byers vs. Commonwealth, 42 Pa. St. 89.
Rhines vs. Clark, 51 Pa. St. 96.
Howe vs. Treasurer of Plainfield, 37 N. J. L. 145.
Murphy vs. People, 2 Cow. 815.
People vs. Fisher, 20 Barb. 652.
Commissioners vs. Seabrook, 2 Strobh. 560.
Trigally vs. Mayor, etc., of Memphis, 6 Coldw. 382.
Flint River Steamboat Co. vs. Foster, 5 Ga. 194.

A very fine discussion of what is trial by jury, as known to the common law, is found in the case of Capital Traction Company vs. Hof, 174 U. S. 18. The court reviews the subject historically, and quotes from many of the earliest English decisions. The opinion on this subject is most valuable, and should be read in full. Space here permits only short excerpts from the court's conclusions. It says:

" 'Trial by jury' in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if, in his opinion, it is against the law or the evidence. This proposition has been so generally admitted and so seldom contested, that there has been little occasion for its distinct assertion.

* * * * * * * * *

" Judge Sprague, in the district court of the United States for the district of Massachusetts, said: 'The

Constitution secures a trial by jury, without defining what that trial is. We are left to the common law to learn what it is that is secured. Now the trial by jury was, when the Constitution was adopted, and for generations before that time had been, here and in England, a trial of an issue of fact by twelve men, under the direction and superintendence of the court. This direction and superintendence was an essential part of the trial.' 'At the time of the adoption of the Constitution, it was a part of the system of trial by jury in civil cases that the court might, in its discretion, set aside a verdict.' 'Each party, the losing as well as the winning, has a right to the legitimate trial by jury, with all its safeguards, as understood when the Constitution was adopted.' United States vs. 1363 Bags of Merchandise (1863) 2 Sprague, 85-88."

See on the same subject:

United States vs. Philadelphia & Reading R. R. Co., 123 U. S. 113.
Plimpton vs. Somerset, 33 Vt. 283.
King vs. Hopkins, 57 N. H. 334.
People *ex rel.* Booth vs. Fisher, 20 Barbour Rep. 652.

It is clear from the above decisions that the Seventh Amendment to the Constitution of the United States, in preserving the right of trial by jury in the United States courts, neither increased nor diminished those rights as they were known to the common law at the time the amendment was passed; and it is further clear, that in such a common law trial the jury are the judges of the facts solely, and the court decides all those issues at the trial which can be determined by the application of principles of law. In other words, if trial by jury is to be had as known to the common law, it is as essential in such trial that the court

should have the right to exercise all the prerogatives which originally belonged to it in administering justice as that the jury should have its prerogatives kept inviolate. Therefore, any legislation which would curtail or limit such prerogatives of the court would be as much subject to the charge of unconstitutionality as any legislation which would take away from the jury any of the privileges which originally belonged to it under the common law.

These prerogatives of the court, then, to decide the issues of law and to set aside the verdict, if, in its opinion, the same is contrary to law, necessarily mean that the instructions given by the court to the jury are to have the force of law, and that in consequence the jury is bound to obey the instructions of the court. See the elaborate note on this subject in 11 Encyclopædia of Pleading and Practice, p. 62.

Since, then, actions under the statute involve the determination of questions of liability and the need of instructions from the court as to the law, for the purpose of determining such liability, questions of negligence and of contributory negligence can not be questions for the jury in the sense that the court shall no longer control the manner in which such questions shall be submitted to the jury; and, furthermore, if the court, under the Seventh Amendment, can not be prevented by legislation from reviewing the facts to determine whether the verdict has been rendered according to law, it, of course, follows that the court may also, in accordance with the rules of the common law as applied to jury trials, review such facts before they are submitted to the jury for the purpose of determining whether there are any issues involved in the case except questions of law.

We believe, then, that it was not within the power of Congress to pass an act which would take from the trial court the right to review the evidence and determine for itself whether, from the standpoint of law, the issues had been proved.

This being so, it must be presumed that Congress, in enacting Section Two of the Employers' Liability Act, had in mind the limitations placed upon it by the Seventh Amendment to the Constitution of the United States. Therefore, the language of Section Two must be interpreted in the light of the limitations created by the Seventh Amendment.

It follows, of course, that if, in reading the language of Section Two in connection with the Seventh Amendment, it appears that the language thereof is clearly repugnant to the Seventh Amendment, in the sense that it shows an attempt to legislate in a manner prohibited by such Amendment, then the courts would be bound to declare the section unconstitutional. If, however, the language of the section could be so read that it might be interpreted as falling within the limitations of the constitutional provision, it is beyond doubt that the courts would give it such meaning for the purpose of sustaining its constitutionality.

Is such latter interpretation possible? We have already expressed the opinion that the preceding portion of Section Two, if interpreted according to the decisions of Illinois, Tennessee and Georgia, is but declaratory of the common law, except in the respect that it permits a comparison of the respective acts of the parties to be used only for the purpose of measuring damages. If this interpretation be correct, would it not be possible to interpret the remaining sentence of the section in connection with its preceding language, and limit it by the effect of such preceding language; and if this method be applied, would it not then mean that all questions of negligence and of contributory negligence shall be ultimate facts to be determined by the jury, subject to the application thereto of the principles of law governing liability as prescribed by the preceding language of the section?

If the above interpretation be not possible, then it is hard to escape the conclusion that the section is unconstitutional.

Therefore, it would seem to follow that either Section Two is clearly unconstitutional, or must be interpreted as declaratory of the common law, except in so far as it permits the conduct of the parties to be taken into consideration in computing damages.

Assuming that it be declaratory of the common law, except as modified in the manner suggested, by what principles of law should the court be governed in conducting the trial? This query, we think, may be considered under three heads.

1. As to directing a verdict.

2. As to the character of instructions for the purpose of determining liability; and

3. As to the character of instructions for measuring damages.

First: As to directing a verdict.

Since the common law principles in determining liability have not been changed, we believe that the court in determining whether, in any particular case, a verdict should be directed by it or not, ought to be governed by the same precedents and rules of law that have heretofore governed Federal Courts in like cases.

Second: As to the character of instructions for the purpose of determining liability.

Since the principles of the common law as to liability have not been altered, we believe that the court, in instructing the jury as to what shall constitute liability on the part of the defendant, should be governed by the same precedents and principles that have heretofore governed Federal Courts in like instances.

Third: As to the character of instructions for measuring damages.

The provision of the section in respect of the rule for measuring damages is a modification of the common law rule, since under the common law the conduct of the

plaintiff was considered only from the standpoint of determining whether he had a right of recovery or not, and under the statute such conduct is to be taken into consideration in determining the amount of damages which he ought to recover.

We think that the court should explain to the jury the distinction between the rule at common law in this respect, and the rule as prescribed by the statute, and that for this purpose it should call the attention of the jury to that part of the statute which makes reference to different degrees of negligence and provides that contributory negligence shall not bar a recovery where his (the plaintiff's) contributory negligence was slight and that of the employer was gross in comparison. In this connection the court should instruct the jury that from the standpoint of liability this language does not alter the rule of contributory negligence as known to the common law, and for this purpose the court should state that the existence of slight negligence is not incompatible with the existence of ordinary care; for a party may fail to observe the highest degree of care and, in consequence, be guilty of slight negligence, but at the same time may have exercised ordinary care, being the legal standard of care required by the common law. Conversely, the court should state that the plaintiff could not have failed to exercise ordinary care and at the same time have been guilty only of slight negligence; for a failure to exercise ordinary care is, of course, evidence of ordinary negligence. The court should also instruct the jury that the defendant's negligence, no matter how flagrant in character, can in law never be aught else than negligence or legal fault; that, in consequence, in comparing it with the plaintiff's, it will never be gross unless the plaintiff's negligence is only slight, for if the plaintiff's negligence be ordinary—that is, the want of ordinary care—then the plaintiff is guilty of a legal fault, which is all that the defendant can ever be guilty of from the standpoint of liability; that the jury, therefore, in com-

paring the respective acts of negligence of the parties on the basis of slight and gross, should not do so for the purpose of determining liability, but should simply take into consideration these respective degrees of want of care for the purpose of measuring damages.

As to the method of measuring damages, we think the court should instruct the jury that the plaintiff's conduct is to be taken into consideration for the purpose of being compared with that of the defendant in order that if he be found to have been guilty of negligence short of such as would prevent his recovery, his conduct, in this respect, may be made the basis for charging against him a portion of the damages, which under the common law would have been entirely thrust upon the defendant.

The court should, therefore, instruct the jury that if they shall find, under its previous instructions, that the plaintiff is entitled to recover from the defendant, they shall then examine the conduct of the plaintiff to determine whether he has been negligent in any respect whatever, and if they shall find that he has been guilty of such negligence, they shall then weigh his acts of negligence in comparison with the acts of negligence of the defendant, for the purpose of apportioning the damages between the parties; and to enable the jury to find some basis of apportionment, we think the court should instruct the jury as to the relative degrees of care required of either party, in order that the jury may determine how far each may have departed from such standards of care.

PART III.

SECTION THREE IS UNCONSTITUTIONAL.

This section reads as follows:

> "That no contract of employment, insurance, relief benefit or indemnity for injury or death, entered into by, or on behalf of, any employes, nor the acceptance of any such insurance, relief benefit or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employes; *Provided, however*, that upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed towards any such insurance, relief benefit or indemnity that may have been paid to the injured employe, or, in case of his death, to his personal representative."

We think this section is unconstitutional.

1. Because the section is in no sense a regulation of interstate commerce. It does not pretend to prescribe a rule by which either traffic or transportation is to be regulated.

2. Because even if it should be held to be a regulation of interstate commerce it is invalid, since it applies without distinction to all employes, whether engaged in interstate or purely intrastate commerce, or in commerce of any kind.

3. Because it is that kind of class legislation which is obnoxious to the Constitution.

4. Because it is an unwarrantable interference with the liberty of contract protected by the Fifth Amendment to the Constitution.

The reasons in support of the first, second and third objections have already been fully given, and need not be repeated here.

In Appendix A will be found abstracts of two recent opinions, both fully sustaining the first and second objections. As these decisions will soon appear in the Federal Reporter it has not seemed necessary to print them in full.

In our opinion, under the present state of the authorities, there need be very little said in support of the fourth objection.

What the Fifth Amendment secures as against the Central Government, the Fourteenth Amendment secures as against State action.

The Fifth Amendment declares among other things:

> " No person shall be deprived of life, liberty or property without due process of law."

The Fourteenth Amendment declares among other things:

> " Nor shall any State deprive any person of life, liberty or property without due process of law."

All the State Constitutions have guarded this trinity of rights in more or less varying forms of expression. Whatever, therefore, may be included in the words " life, liberty and property " is protected from invasion by the fundamental law of every sovereign power in this country. The rights, therefore, included within those words are, in the language of Mr. Justice Harlan, the most important and sacred of individual rights intended to be protected. Let us, therefore, see what is included in these words:

In Allgeyed vs. Louisiana, 165 U. S. 578, the Supreme Court, through Mr. Justice Peckham, said:

> " The liberty mentioned in the Fourteenth Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avoca-

tion; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

In the case of Arthur vs. Oakes, 63 Fed. Rep. 310, Mr. Justice Harlan said:

"Free will in making private contracts, and even in greater degree in refusing to make them, is one of the most important and sacred of the individual rights intended to be protected."

Again, the Supreme Court, through Mr. Justice Peckham, in the case of Lochner vs. N. Y., 198 U. S. 45, in holding a statute of New York, limiting the hours of employment in bakeries, unconstitutional, said:

"Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power, and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employes if the hours of labor are not curtailed. If this be not clearly the case, the individuals whose rights are thus made the subject of legislative interference are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the State has no power to limit their right as proposed in this statute."

In four States of the Union acts have been passed, the effect of each of which was to prohibit employers from dis-

charging or threatening with discharge, or interfering with or discriminating against, employes because they belong to unions. In every one of these States when the question was brought to the court of last resort the act was held invalid as an unwarrantable interference with the right of contract which, it was said, was included within the words "liberty and property."

The case of State vs. Julow, 129 Mo. 163, s. c. 31 S. W. 781, brought in question an act of the State of Missouri, and the court, after stating the substance of the act, and the various provisions of its constitution which it said found their counterpart in the Fifth Amendment to the Federal Constitution, declared as follows:

> "In Section 30, supra, as well as in the section of the Federal Constitution just recited, it will be noted that the rights of life, liberty and property are grouped together in the same sentence. They constitute a trinity of rights, and each as opposed to unlawful deprivation thereof is of equal constitutional importance."

Then, further considering the question as to whether this language embraced the freedom of contract, the court said:

> "Take, for instance, that of property. Necessarily blended with that right are those of acquiring property by labor, by contract, and also of terminating that contract at pleasure, being liable, however, civilly for any unwarranted termination."

A similar statute of Illinois was held invalid in a very strong opinion in the case of Gillespie vs. People, 188 Ill. 176, s. c. 58 N. E. 1007.

A similar statute of Wisconsin was held invalid in the case of State vs. Kreutzberg, 114 Wis. 530, s. c. 90 N. W. 1098. The court in that case used precisely the same

language that was used by Mr. Justice Harlan, above quoted, as follows:

> " Free will in making private contracts, and even in greater degree in refusing to make them, is one of the most important and sacred of the individual rights intended to be protected."

A similar statute of New York was held unconstitutional in the case of People vs. Marcus, 185 N. Y. 257, s. c. 77 N. E. 1073. The liberty of contract has also been asserted in a number of other States, though the question was more indirectly presented. See Wallace vs. Georgia, etc., Ry. Co., 22 S. E. 579; Brewster vs. Miller & Sons, 101 Ky. 358; Hundley vs. L. & N., 105 Ky. 162; State vs. Bateman, 7 Ohio N. P. R. 487.

We are not unmindful of the fact that the Supreme Court has held in the celebrated case of Addyston Pipe & Steel Company vs. U. S., 175 U. S. 211, that it is competent for Congress to prohibit contracts the execution of which will amount to a regulation of interstate commerce, but we call attention to the fact that the court in that case again and again repeated the statement that it must be equally clear that the *natural* effect of the execution of the contract shall have not merely an indirect and remote bearing upon interstate commerce, but must be direct and substantial. We quote one of these statements at page 229:

> " We think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally regulate interstate commerce."

The character of contract prohibited in the third section of the Employers' Liability Act is one that is in the interest of the employes, who, it may be assumed, are *sui juris*, and entirely competent to take care of themselves, and should be allowed the freedom of making such contracts as in their judgment will tend to promote their welfare. Take, for instance, the insurance and relief benefit fund. Such funds are usually inspired, substantially contributed to, and largely brought about by the employer. These contracts are not against public policy, but in furtherance of a sound public policy, and if Congress may take from the employer practically all incentive to foster and contribute to and materially aid in raising such funds, the natural effect will be to cause all employers to cease efforts in that direction, to the great injury of the employes. We can not see how the execution of such contracts can have even a remote bearing upon commerce of any kind, or how, in any sense, the statute affecting these contracts can be said to be laying down a rule for the government of transportation or traffic.

We feel confident that the third section is an unwarranted and unjustifiable attempt to exercise power by Congress over a matter not even remotely falling within its jurisdiction. In closing we wish to repeat, even if there could be said to be a remote bearing, under the Addyston Pipe and Steel Company case, this is not sufficient to deprive the citizen of the individual right of contract. The bearing upon interstate commerce must be *natural*, it must be *certain*, it must be *direct*, and it must be *substantial*. No *remote* or *indirect* bearing will justify Congress in the attempted exercise of the power.

PART IV.

JURISDICTION.

1. *Jurisdiction of Federal Courts.* The Circuit Courts of the United States have original cognizance of all suits of a civil nature arising under the Constitution or laws of the United States, without regard to the citizenship of the parties, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000. The State Courts have concurrent jurisdiction of such suits, without regard to amount, if such courts by State laws are made courts of general jurisdiction, except cases in which the law of the United States that creates the right sought to be enforced expressly confines the jurisdiction in all cases arising thereunder to the Federal Courts. If the matter in dispute does not exceed, exclusive of interest and costs, the sum or value of $2,000, the State Courts alone have jurisdiction, if jurisdiction exists anywhere, unless the law of the United States which creates the right sought to be enforced provides otherwise.

U. S. Compiled Statutes, Vol. 1, page 508 (4 Fed. Statutes Annotated, p. 265).
Patten vs. Chicago, etc., Ry. Co., 74 Fed. 981.
U. S. vs. Sayward, 160 U. S. 493.
Fishback vs. W. U. Tel. Co., 161 U. S. 96.

2. *Jurisdiction of State Courts.* The State Courts may enforce rights given by acts of Congress.

Claflin vs. Houseman, 93 U. S. 130.
C. & O. Ry. Co. vs. American Exchange Bank, 92 Va. 495 (23 S. E. 935).
Cincinnati, etc., Rd. Co. vs. Gregg, 80 S. W. 512 (25 Ky. Law Rep. 2329).

It is provided by Section 2 of Article VI of the Constitution of the United States that

> " This Constitution and the laws of the United States which shall be made in pursuance thereof; and also treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

While this provision of the Constitution may not authorize Congress to require State Courts to take jurisdiction of actions to enforce rights given by acts of Congress, it does require them to enforce such rights, where the jurisdiction conferred upon them by State laws is broad enough to embrace actions to enforce those rights.

3. *District in which suit must be brought.* No civil suit can be instituted and maintained in the Circuit Court of the United States, over defendant's objection, except in the district whereof the defendant is an inhabitant, unless the jurisdiction is founded only on the fact that the action is between citizens of different States. And a civil suit against a corporation incorporated in a State of the Union can not be maintained, over its objection, in a Circuit Court of the United States held in another State, where it has not been incorporated, even if the corporation has a usual place of business in the latter State.

In re Keasbey & Mattison Co., 160 U. S. 221.
Southern Pac. Co. vs. Denton, 146 U. S. 202.

Where the defendant is a corporation, and the State in which it was incorporated is divided into two or more districts, the corporation can be considered an inhabitant only of the district in which it has its headquarters, or such offices as answer in the case of a corporation to the dwelling of an individual.

Galveston, etc., R. Co. vs. Gonzales, 151 U. S. 496.

4. *Waiver of objection to jurisdiction.* The defendant corporation may, by appearing generally, or by answering to the merits of the action, without first objecting to the jurisdiction, waive the privilege of being sued in the district of which it is an inhabitant, but the privilege is not waived by a special appearance for the purpose of objecting to the jurisdiction, or by filing an answer to the merits after that objection has been overruled.

Harkness vs. Hyde, 98 U. S. 476.
Southern Pac. Co. vs. Denton, 146 U. S. 202.

5. *Not necessary to allege residence of defendant.* It is not necessary, in order to give the court jurisdiction of the subject-matter, to aver that the defendant is an inhabitant of the district in which the suit is brought.

Gracie vs. Palmer, 8 Wheaton, 699.
Southern Express Co. vs. Todd, 56 Fed. 104.

REMOVAL OF CAUSES.

1. *Allegations in declaration necessary to authorize removal.* It is not clear from the decisions just what allegations in the declaration are necessary to be made to satisfy the rule which requires that, in order to authorize a removal from the State Court to the Federal Court upon the ground that plaintiff's cause of action arises under the Constitution or laws of the United States, it must appear from plaintiff's statement of his cause of action that it does so arise.

We are of opinion, however, that where the plaintiff alleges facts in his petition sufficient to show that he has a right of action under the Employers' Liability Act, and the jurisdictional amount is claimed, his suit must be regarded as arising under the laws of the United States and can be removed into the Federal Court.

State of Tennessee vs. Bank of Commerce, 152 U. S. 454.
Oregon, etc., R. Co. vs. Skottowe, 162 U. S. 490.
Spencer vs. Duplan Silk Co., 191 U. S. 526.

2. *Suits which are removable.* Suits which can be removed into the Federal Court are those arising under the Constitution or laws of the United States, and of which the Circuit Court of the United States has original jurisdiction.

A suit, within the meaning of these terms, is the plaintiff's cause of action and not the defense to the action.

A critical examination of the cases decided by the Supreme Court, involving removals on the ground that the suit was one arising under the Constitution and laws of the United States, will show that in every case where the right of removal has been denied, the right of action of the plaintiff was one not dependent upon or created by the Constitution or laws of the United States. In each of such cases the Federal question has been one invoked by the defendant as an answer to the plaintiff's claim.

3. *Alleging in petition for removal facts making case a removable one.* If, therefore, a plaintiff states a cause of action and it is one that does not arise under the Constitution or laws of the United States, then the suit is not removable even though the defendant shows by his petition for removal that there is something in the Constitution or laws of the United States which would prevent a recovery by the plaintiff. If, however, the suit is one in which the plaintiff's right of action necessarily depends on the Constitution or laws of the United States, then the defendant can, in the petition for removal, make this appear and remove the cause. It seems to us that this is proved by the case of Texas & Pacific Railway vs. Cody, 166 U. S. 606, where the court said:

> "By the acts of Congress of 1887 and 1888, the jurisdiction of the Circuit Court on removal by defendant (and defendants alone can remove) is limited to such suits as might have been originally brought in that court; and it is essential if the jurisdiction is invoked on the ground that the cause of action arises under the

Constitution, laws or treaties of the United States, that this should be asserted. If recovery directly depends upon a right claimed under the Constitution, laws or treaties, plaintiff's statement of his case must necessarily disclose the fact; and if the action is brought in the State Court, defendant can remove it. If, however, plaintiff asserts no such right, and defendant put his defense on the possession of such right, or its denial to plaintiff, though essential to his recovery, then defendant is remitted to his writ of error from this court to the State Court to test the Federal questions thus raised.

"It is obvious that in the instance of diverse citizenship a different question is presented. Plaintiff may run his own risk in respect of the cause of action on which he proceeds, but he can not cut off defendant's constitutional right as a citizen of a different State than the plaintiff, to choose a Federal forum, by omitting to aver, or mistakenly, or falsely, stating the citizenship of the parties.

"And this must be so, also, as to Federal railroad corporations. It was held in the Pacific Railroad Removal cases that as all the faculties and capacities possessed by such corporations were derived from their acts of incorporation by Congress, all their doings arose out of those laws, and, therefore, suits by and against them were 'suits arising under the laws of the United States.' Conceding this, the principle applicable to diverse citizenship may reasonably be applied to them."

We call attention to this sentence:

"If, however, plaintiff asserts no such right (that is, under the Constitution, laws or treaties) and defendant put his defense on the possession of such right, or its denial to plaintiff, though essential to his recovery, then defendant is remitted to his writ of error from

this court to the State Court to test the Federal questions thus raised."

By the language, "if defendant put his defense on the possession of such right," we understand to be meant the possession of such right of defense under the Constitution, laws or treaties. By the language, "or its denial to the plaintiff," we understand is meant the denial, by the Constitution, laws or treaties, of something to the plaintiff, though essential to his recovery.

4. *Act exclusive.* If the Employers' Liability Act is exclusive (and we suppose this will be conceded) then, whenever a suit is brought by an employe for an injury suffered while in the employment of an interstate carrier, or, in case of death, by his personal representative, of necessity the right of the plaintiff arises under the laws of the United States. His right under the common law or the statutory law of the State, as the case may be, is gone, and there remains to him only this right under the laws of the United States, viz., the Employers' Liability Act. His failure to state that the defendant is a carrier engaged in interstate commerce is analogous to his failure to state that the defendant is a citizen of a State other than that of the plaintiff, or his failure to state that the defendant is a Federal corporation. A case may, however, be imagined where the defendant would not have a right to remove. For instance, suppose that a personal representative were to sue and it were to appear that the deceased person left no widow, children, father, mother, or next of kin dependent upon him, then his suit would not be under the Employers' Liability Act, because not embraced within its terms. Here the defendant would have to set up the Employers' Liability Act as an act which denied to the plaintiff, by its supersession of the State law under which he was prosecuting his suit, the right to any recovery whatever.

We think, therefore, that until the Supreme Court shall declare this act unconstitutional, (*a*) if the pleading of the plaintiff shows that the defendant is an interstate carrier, and fails to show, as in the instance given above, that there is no right of action under the Employers' Liability Act, the defendant can remove the case without regard to whether the plaintiff, on the face of his petition, expressly claims under the act of Congress; and (*b*) where the petition fails to state that the defendant is an interstate carrier, such allegation may be supplied in the petition for removal and the case removed under the same circumstances as would make it removable if the plaintiff had stated that the defendant was an interstate carrier. In such a petition for removal nothing should be said as to whether the Employers' Liability Act is, or is not, constitutional.

5. *Case remanded if Federal Court holds Act of Congress void.* It always belongs to the State Court to determine whether a petition for removal is sufficient upon its face. If, therefore, a petition should be filed for the removal of a suit from the State Court to the Federal Court, upon the ground that the Employers' Liability Act had superseded the common and statutory laws of the State on the subject, and the State Court should be of opinion that the Employers' Liability Act was invalid, it would decline to enter the order of removal. (Stone vs. South Carolina, 117 U. S. 430.) Notwithstanding its declination, however, the defendant could file the record in the Federal Court. If a motion is there made to remand and the court should determine that the Employers' Liability Act is invalid, then it would remand the case, as the jurisdiction of the Federal Court would depend alone upon the fact that the suit was one arising under the laws of the United States. If the court determined that there was no such law, then, logically, it should decline to entertain jurisdiction. If, however, the Federal Court regarded the law as constitutional, it would

retain jurisdiction; and if the plaintiff, notwithstanding the assumption of jurisdiction by the Federal court, should insist on proceeding in the State Court, the Federal Court would enjoin him from further prosecuting the action in the State Court.

Madisonville Traction Co. vs. Saint Bernard Mining Co., 196 U. S. 239.

6. *Disclaimer by plaintiff that he sues under act of Congress.* If the plaintiff should, upon the filing of the petition for removal, disclaim of record that he sues under, or relies upon, the act of Congress, he would be entitled to have the case remain in the State Court. The defendant may then set up in the answer the facts showing that the act of Congress applies, and rely upon that act as abrogating or superseding State laws affecting the liability of interstate carriers for injuries to their employes. If the court should be of opinion that the act of Congress is valid and supersedes State laws applying to the case, it would dismiss the action; but if it should be of opinion that the act of Congress is void, or does not supersede State laws on the subject, and the final judgment should be against defendant, the case could be reviewed by the Supreme Court of the United States upon writ of error.

7. *Time to file petition for removal.* When the action is brought in the State Court and, the amount being sufficient to give the Federal Court jurisdiction, the defendant desires to remove the cause to that court, the petition for removal must be filed at or before the time to plead or answer. And the petition is not in time if filed after the time to plead to the jurisdiction, or in abatement of the writ, although filed before the time to plead to the merits of the case.

Martin's Admr. vs. Baltimore & Ohio R. Co., 151 U. S. 673.

The petition for removal must also be filed before any issue of law has been determined by the State Court. That

being true it is too late to file a petition for removal after a demurrer to the plaintiff's declaration or petition has been acted upon, and it may be that it would be too late even after a motion to strike out has been acted upon where such a motion raises a material question in the case, as where, in an action under the Employers' Liability Act, there has been a hearing upon a motion to strike out, which raises the question as to the validity of that act.

Winkler vs. Chicago, etc., R. Co., 108 Fed. 305.

But the premature filing of a defense is not a trial or hearing, and does not establish a waiver of the right to remove.

Atlanta, Knoxville & Northern R. Co. vs. Southern Ry. Co., 131 Fed. 657.

Where the plaintiff does not show by his original petition that his case is within the act of Congress, and subsequently files an amended petition to cure that defect, a petition for removal, filed promptly after the action thus becomes a removable one, is in time.

Powers vs. Chesapeake, etc., R. Co., 169 U. S. 92.

There is some conflict of authority upon the question as to whether a stipulation of counsel, or even an order of court, extending the time for filing answer, extends the time for filing petition for removal, and, therefore, the only safe course is to file a petition for removal at or before the time the defendant is required by statute or by rule of court to make defense.

Fox vs. Southern Ry. Co., 80 Fed. 945.
Chiatovitch vs. Hanchett, 78 Fed. 193.

PART V.

PROCEDURE.

1. *Conformity of Federal Courts to State practice.* As to matters of "practice, pleadings, and forms and modes of proceeding" the courts of the United States are required to

conform, as near as may be, to the practice existing in the courts of the State within which the trial is had.

Rev. Statutes U. S. Sec. 914 (4 Fed. St. 563).
Central Transportation Co. vs. Pullman Palace Car Co., 139 U. S. 24.

As to whether a particular matter of procedure is within that requirement is sometimes difficult to determine. It has been held that the statute was not intended to control the conduct and administration of the judge in the discharge of his separate functions, and that a Federal judge is not, therefore, bound by a statute of the State requiring questions of fact to be submitted to the jury for a special finding.

Grimes Dry Goods Co. vs. Malcolm, 164 U. S. 483.

It has also been held that the courts of the United States are not controlled by provisions of State constitutions or statutes forbidding judges to express any opinion upon the facts (St. Louis, etc., R. Co. vs. Vickers, 122 U. S. 360); or by statutes regulating the manner in which the judge shall charge the jury (Lincoln vs. Power, 151 U. S. 436).

2. *Right of foreign administrator to sue.* The question as to whether a personal representative, who has qualified in another State, can sue in the Federal Court is to be determined by the law of the State in which the action is brought.

Edmunds vs. Illinois Central Railroad Co., 80 Fed. 78.
Cincinnati, etc., R. Co. vs. Thiebaud, 114 Fed. 918.

In the absence of any statute upon the subject, the general rule is that an administrator can not sue outside the State in which he is appointed.

Noonan vs. Bradley, 9 Wall. 394.

Almost every State now has a statute authorizing foreign administrators to sue. Some of those statutes limit

the right to actions for debts or on contracts, while others authorize the foreign administrator to enforce any right of action which he may have.

L. & N. R. R. Co. vs. Brantley's Admr., 96 Ky. 297.
Maysville Street Railroad & Transfer Co. vs. Marvin, 59 Fed. 91.
Cincinnati, etc., R. Co. vs. Thiebaud, 114 Fed. 918.

In some cases, in the absence of a statute authorizing foreign administrators to prosecute actions for tort, it has been held that the general rule which prohibits the foreign administrator from suing does not apply where he sues for the benefit of particular persons named in the foreign statute under which he sues, for the reason that the statute creates a trust and the administrator sues as trustee and not as administrator.

Wilson vs. Tootle, 55 Fed. 211.
McCarty vs. New York, etc., R. Co., 62 Fed. 437.

But that distinction has not always been recognized.

Cincinnati, etc., R. Co. vs. Thiebaud, 114 Fed. 918.

3. *Application of State statute providing for surgical examination.* Under Section 721 of the Revised Statutes of the United States, providing that "the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in which they apply," it has been held that a State statute providing for the surgical examination of the plaintiff in an action for damages for a personal injury applies in trials at common law in the

United States courts sitting in the State where the statute exists.

Camden & Suburban R. Co. vs. Stetson, 177 U. S. 172.

4. *Congress can not control State Courts in matters of practice.* In the trial of actions in the State Courts the State laws will control in all matters of procedure. Congress can not require State Courts to take jurisdiction of actions to enforce rights which it creates, and it is not to be presumed that it has attempted to do so.

Houston vs. Moore, 5 Wheaton, 27.
Claflin vs. Houseman, 93 U. S. 130.
Robertson vs. Baldwin, 165 U. S. 275.
Morgan vs. Dudley, 18 B. M. (Ky.) 693.
State of New Jersey vs. Judges of Inferior Court (N. J.) 58 N. J. Law 97 (30 L. R. A. 761).

While Section 2 of Article VI of the Constitution of the United States provides that the judges in every State shall be bound by the laws of the United States made pursuant to that Constitution, it does not follow that Congress can require State Courts to take jurisdiction of actions to enforce rights given by acts of Congress, the jurisdiction of State Courts being exclusively a matter of State regulation, and, therefore, the State Courts derive their jurisdiction from State laws.

Since, therefore, the jurisdiction of State Courts to enforce rights given by acts of Congress is conferred by the laws of the State, the rules of procedure which apply to actions brought to enforce similar rights given by the laws of the State apply to actions brought in the State Courts to enforce rights given by acts of Congress, in the absence of the adoption by the State of special rules of procedure applying to such actions. Therefore, the provision of Section 2 of the Employers' Liability Act, that all questions

of negligence and contributory negligence shall be for the jury, even if valid as applied to Federal Courts, does not control the State Courts, that being a matter of practice or procedure.

Mass. Benefit Life Asso. vs. Robinson, 104 Ga. 256 (42 L. R. A. 261).

Central Transp. Co. vs. Pullman Palace Car Co., 139 U. S. 24.

5. *Reliance of defendant upon the act.* If there are facts sufficient to bring the case within the act of Congress but plaintiff has failed to allege such facts, the defendant, if it wishes for any reason to have the act of Congress applied, should allege the omitted facts in its answer, and expressly rely upon the act. While there may be very few cases in which it would be to the interest of defendant to have the act of Congress applied rather than the State law, it is possible to conceive such cases, as where the State statute authorizes a recovery after the lapse of one year, or authorizes a recovery in case of death although there be no widow, child, father, mother or dependent next of kin.

6. *Raising question of constitutionality of act.* It may sometimes be difficult to determine just how to raise the question as to the constitutionality of the act.

Where the petition or declaration is so drawn that it can not be told whether the plaintiff sues under the act or under the State law, the defendant probably should move to strike the pleading from the files for uncertainty or move to require the pleading to be made more certain. If either or both of these motions be overruled, a demurrer alone might not raise the question as to the validity of the act, and so it would probably be well to also make a motion to strike out any allegations relating to interstate commerce, which allegations would be surplusage if the act be void. If the plaintiff should declare in a single count on the State law and also on the act of Congress, a motion to strike out

for duplicity or a motion to require the plaintiff to paragraph should be made. If a motion to paragraph should be sustained, or if the plaintiff should originally declare in one count on the State law and in another on the act of Congress, a motion to elect should be made. If that motion should be overruled, a demurrer to the count declaring on the act of Congress would still raise the question as to the validity of that act. If the motion to elect should be sustained, and plaintiff should elect to proceed under the act of Congress, or if the plaintiff should originally declare in a single count upon the Federal statute, of course a demurrer would raise the question as to the constitutionality of the statute. Every demurrer and every motion based upon the invalidity of the act should specifically draw in question its constitutionality. If the case should go to trial, and a motion for a peremptory instruction or to direct a verdict for the defendant be overruled, requests for instructions should be so framed as to clearly present all defenses which would be available if the act be void.

PART VI.

LIMITATION OF ACTIONS.

1. *Limitation prescribed by act and not by law of forum applies.* The general rule is that the law of the forum relating to the limitation of actions applies to actions arising under the statutes of another sovereignty, but this is not true where the statute creating the right sought to be enforced expressly provides that no action to enforce that right can be maintained after the lapse of a certain time. In such cases no right exists after the lapse of the time prescribed for bringing suit, and neither the courts of the sovereignty which created the right nor the courts of any other sovereignty will then recognize the right as still subsisting. The limitation is inherent in the right of action,

and plaintiff must show that he sues within the time prescribed.

Brunswick Terminal Co. vs. National Bank of Baltimore, 99 Fed. 635.
Boston & Maine Railroad vs. Hurd, 108 Fed. 116 (56 L. R. A. 193 and note).
The Harrisburg, 119 U. S. 199.
Wintersmith vs. Pointer, 2 Met. (Ky.) 460.

It follows, therefore, that an action can not be maintained under the Employers' Liability Act, either in a Federal Court or in a State Court, after the lapse of one year from the time the cause of action accrued.

2. *Where death is not instantaneous, limitation runs from date of injury.* In considering this subject we find it necessary to state two views, each of which can be sustained fairly.

a. Where the injured person has died, but death was not instantaneous, and the action is brought by his administrator the cause of action must be regarded as having accrued when the injury was inflicted, and as barred after the lapse of one year from that time, just as it would have been if the injured person had sued. The act does not give a separate right of action for causing the death of the employe, but provides for the survival of the cause of action given to the injured employe, but there is nothing in the act to indicate that the death furnishes a new, independent cause of action, or a new starting point for the running of the statute, and the fact that the right of action is given to the administrator in the case of death, without regard to whether or not the death resulted from the injury, shows that the period of limitation prescribed runs from the date of the injury.

Fowlkes' Admr. vs. Nashville & Decatur R. Co., 9 Heisk. 829.

Whaley vs. Catlett, 103 Tenn., 347 (53 S. W. 131).
Sherman vs. Western Stage Co., 24 Iowa, 515.
Lyon vs. Boston & M. R. Co., 107 Fed. 386.

While the general rule is, where the action is for causing the death, that the statute does not begin to run until death occurs (Louisville, E. & St. L. R. Co. vs. Clarke, 152 U. S. 230), the statutes under which that rule has been applied have all been separate death statutes, giving a right of action against any person who has caused the death of another by wrongful act, while the Employers' Liability Act of Congress gives a right of action to the injured employe and, in the alternative, to his administrator, without any language to indicate that the administrator is to have a right of action only in the event the death resulted from the injury. The recovery is not restricted to damages for personal injuries resulting from the employer's negligence but embraces damages for injury to, or loss of, property resulting from such negligence, which strengthens the conclusion that the words "in case of death" are not limited to death resulting from injuries inflicted by the negligence of the employer.

As was said by District Judge Wheeler, in Lyon vs. Boston & M. R. Co., 107 Fed. 386, referring to the New Hampshire statute, "this statute does not create a new right of action in the administrator, but keeps alive a former one of the intestate with enlarged damages."

b. The other view grows out of comparing Sections 1, 2 and 3 of the act. While Section 1 of the act provides that the common carrier "shall be liable to any of its employes; or, in the case of his death, to his personal representative," Section 2 provides that "in all actions hereafter brought against any common carriers, to recover damages for personal injuries to an employe, or where such injuries have resulted in his death—"; and the third section provides

that "no contract of employment * * * shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employe."

We think it may be well argued that reading Sections 1, 2 and 3 together, a personal representative can not maintain any action unless the employe dies of the hurt. If we are correct in this, then if the employe is injuried and dies from some other cause, the personal representative can neither revive the employe's action for such personal injury nor bring another one.

Taking any view of this statute it is our opinion that a personal representative can maintian no action which the employe could not maintain. So that if the employe is barred of his action, either by recovering judgment, or compromise or limitation, and subsequently dies, his personal representative can maintain no action. If, however, the employe is injured and dies as the result of such injury within twelve months from the date thereof, two views may be taken of the limitation prescribed in Section 4: (1) That the personal representative must sue within the remaining time left to the employe; that is, that the limitation begins to run as to the suit of the personal representative from the time of the injury; (2) that the limitation does not begin to run against the personal representative except from the time the employe dies, provided the employe has not lived long enough to bar his action. If he has lived a year we are of the opinion that the personal representative is barred.

Whether the action of the personal representative is a survival of the action given to the employe, or a right of action given to the personal representative, we are clearly of opinion that there are not two rights of action. The statute says

> "Shall be liable to any of its employes; or, in the case of his death, to his personal representative."

The action given to the personal representative, therefore, if not a survival of the right of action given to the employe is, at most, a substituted right of action.

We further think that the statute can be fairly construed as limiting the personal representative to damages caused by the death of the employe, and as excluding from the recovery by the personal representative any damages on account of the pain or suffering of the employe.

The statute is so confused and uncertain in its terms that we have felt constrained to state the different possible constructions of its meaning.

3. *Where death is instantaneous, limitation runs from that date.* Where death is instantaneous, the general rule is that the action is to be regarded as having accrued at the time of the death, although there was no person in being who was authorized to sue.

Louisville, E. & St. L. R. Co. vs. Clarke, 152 U. S. 230.
Hanna vs. Jeffersonville R. Co., 32 Ind. 113.
Carden vs. Louisville & Nashville R. Co., 101 Ky. 113.
Rodman vs. Mo. Pac. R. Co., 65 Kansas, 645 (59 L. R. A. 704).

PART VII.

APPEAL AND ERROR.

I. Review by Supreme Court of judgments of State Courts. The Supreme Court of the United States has jurisdiction to review the final judgment of the highest court of a State in which a decision could be had in three classes of cases:

1. Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against the validity of such treaty, statute or authority.

2. Where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground that such statute or authority is repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

3. Where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority.

Where the decision of the State Court is in favor of the validity of the act of Congress, the case is not within the first class, but if the defendant has specifically set up the right to be exempt from liability upon the ground that the act of Congress violates some provision of the Constitution of the United States conferring upon defendant some privilege or immunity, such as the Fifth or the Seventh Amendment, and not merely that Congress has exceeded its authority, a decision of the State Court upholding the statute is a denial of the right thus claimed under the Constitution of the United States, and the case then comes within the third class.

Trebilcock vs. Wilson, 12 Wall. 687.
State of Missouri vs. Andriano, 138 U. S. 497.

Woodruff vs. State of Mississippi, 162 U. S. 291.
Ill. Cent. R. Co. vs. McKendree (U. S. Sup. Ct.) decided Dec. 17, 1906.

And the case may also come within the third class if defendant has specifically asserted a right under the act, or the right to be exempt from liability under the act, which has been denied him.

Palmer vs. Hussey, 119 U. S. 96.
Nutt vs. Knut, 200 U. S. 12.
Ill. Cent. R. Co. vs. McKendree (U. S. Sup. Ct.) decided Dec. 17, 1906.

A case will come within the second class if defendant has relied upon the act of Congress as abrogating or superseding a State law, and the State Court has refused to give it that effect, although holding it to be valid. A State statute, which is only an incidental regulation of commerce, may be valid until Congress acts upon the subject-matter, but when Congress does act the statute may be as much in contravention of the Constitution of the United States as if Congress had already acted when the statute was enacted. Of course, where it is proper for defendant to plead the act of Congress for the purpose of showing that it is exclusive and that the State law is unconstitutional, the answer should be carefully drawn so as to clearly present both questions: (1) that defendant is claiming a right under the Federal statute, and (2) that the State law is in contravention of the Constitution of the United States.

II. *Review of Judgments of Federal Courts.*

Where cases are tried in the Circuit Court of the United States the jurisdiction of appeals or writs of error is regulated by Sections 5 and 6 of the Judiciary Act of March 3, 1891.

So much of Section 5 as is pertinent is as follows:

"That appeals or writs of error may be taken from the district or from the existing circuit courts direct to the Supreme Court in the following cases:

"1. In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

* * * * * * * * *

"4. In any case that involves the construction or application of the Constitution of the United States.

"5. In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question.

"6. In any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

* * * * * * * * *

4 Federal Statutes, Annotated, p. 398.

Where jurisdiction is the sole question in issue the Supreme Court alone has jurisdiction to review the decision of the Circuit Court thereon. Where other questions are involved which are within the jurisdiction of the Circuit Court of Appeals, the whole case may be taken to, and decided by, that court, and the question of jurisdiction then certified to the Supreme Court.

United States vs. Jahn, 155 U. S. 109.
American Sugar Refining Co. vs. Johnson, 60 Fed. 503
Sun Printing, etc., Asso. vs. Edwards, 121 Fed. 826.

The Circuit Court of Appeals has no jurisdiction to review an order of the Circuit Court remanding a case to the State Court for lack of jurisdiction.

In re Coe (C. C. A.), 49 Fed. 481.
In re Aspinwall (C. C. A.), 90 Fed. 675.

Cases involving the constitutionality of the act go direct from the Circuit Court of the United States to the Supreme Court, whether the judgment be for the plaintiff or the defendant, and that court acquires jurisdiction of the entire case and not merely of the question which gives it jurisdiction.

Horner vs. U. S., 143 U. S. 570.

All of which is respectfully submitted, this January 11, 1907.

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APPENDIX A.

UNITED STATES CIRCUIT COURT.

Western District of Kentucky.

N. C. BROOKS, ADMINISTRATRIX,

vs.

THE SOUTHERN PACIFIC COMPANY.

STATEMENT OF FACTS.

Morris S. Brooks, a citizen and resident of Kansas, but employed by the defendant as a fireman on one of its locomotives engaged in interstate commerce in the State of Nevada, having been killed in the latter State on June 16, 1906, by the negligence of certain of his fellow-servants in the same occupation, the plaintiff, N. C. Brooks, his mother, was qualified as his personal representative by the Probate Court of Cowley County, Kansas. Thereafter, she, alleging herself to be a citizen of Kansas, instituted this action against the defendant, a corporation created by the laws of Kentucky, seeking to recover $25,000 in damages for the injury to her son, resulting from the alleged negligence of the defendant's employes. The defendant filed a general demurrer to the petition, which was sustained.

Abstract of Opinion Delivered by District Judge Evans, December 31, 1906.

1. As there is no law which authorizes or directs the Attorney-General to support by argument in the courts generally the legislation of Congress where the United States is not a party, and its interests are not involved in any tangible way, the practice on the part of that officer of sending a special assistant to intervene on behalf of the government in litigation which is strictly *inter partes*, and with which the United States has no concern, should not be encouraged, but such special assistant of the Attorney-General may be heard as a friend of the court.

2. Under the Employers' Liability Act of Congress the administrator of a deceased employe appointed in the State of his intestate's domicile may sue in the Federal Court of another State of which the defendant railroad corporation is a citizen, the defendant not operating its railroad in the State of the deceased employe's domicile, and the presumption being that neither any court of the State in which the intestate was killed nor any court of the State in which the suit is brought would have jurisdiction to appoint an administrator.

3. A mere claim for damages for a tort does not seem to be assets for the purpose of authorizing the appointment of an administrator in the jurisdiction in which the wrongdoer resides, or in which suit might be brought.

4. If the Employers' Liability Act be valid as a regulation of commerce it is the supreme law of the land of general application, and as such is binding upon all courts, State and Federal, and fixes imperative rules by which all of them must hereafter be governed.

5. As the act merely imposes a liability upon interstate carriers to their employes, and in no way prescribes rules for carrying on commerce among the States, it does not

regulate such commerce, and is, therefore, beyond the power of Congress, and for that reason unconstitutional.

6. Even if the act be considered as regulating commerce among the States it equally regulates commerce that is exclusively within the several States, thus embracing a regulation which is not within the power of Congress, and as the two subjects are so connected that they can not be separated the entire act must be declared void.

7. As the common law gives no right of action for an injury resulting in death the right of an administrator to sue in one State on account of the death of his intestate occurring in another State from an injury inflicted there depends upon the statutory law of the latter State; and, therefore, an administrator can not sue in Kentucky on account of the death of his intestate in Nevada from an injury inflicted in that State, as Section 3983 of the compiled laws of Nevada giving a right of action against one person for causing the death of another seems to make the right depend upon the strict condition that the action shall be brought in Nevada and not elsewhere.

8. Even if the right of action given by the Nevada statute is transitory an administrator appointed in Kansas can not prosecute an action under that statute in Kentucky, even in a Federal Court, as the statutes of Kentucky do not authorize a foreign administrator to sue in that State for a tort, and an administrator appointed in one State can not sue in another State unless authorized to do so by its statutes.

UNITED STATES CIRCUIT COURT.

Western District of Tennessee,
Western Division.

DAMSELLE HOWARD, ADMINISTRATRIX,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

STATEMENT OF FACTS.

Will Howard, employed as locomotive fireman by defendant railroad companies, was killed while in the discharge of his duties, and thereupon Damselle Howard qualified as his administratrix, and brought this action to recover damages under and by virtue of the Employers' Liability Act of Congress, approved June 11, 1906. The defendants filed a demurrer to the declaration, which was sustained.

Abstract of Opinion Delivered by District Judge McCall, January 1, 1907.

1. Under the power conferred by the Constitution of the United States upon Congress to regulate commerce among the States Congress has no power to define the liability of interstate carriers for torts resulting in injury to their employes, unless it has, in the first instance, prescribed rules governing the conduct of such carriers towards their employes, and it is only for a breach of those rules that it may fix civil liability.

2. As the Employers' Liability Act does not prescribe rules governing the conduct of common carriers towards their employes, but merely attempts to define their liability for negligence, it is not a regulation of commerce among the States, and, therefore, is unconstitutional.

3. If the act regulates commerce at all, it regulates intrastate commerce as well as interstate commerce, and as Congress has no power to regulate intrastate commerce the entire act must be declared void, it being impossible to separate that part of the act which relates to interstate commerce from that part which relates to intrastate commerce.

APPENDIX B.

An Act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employes, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employes, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works.

SEC. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. All questions of negligence and contributory negligence shall be for the jury.

SEC. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employe, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employe: *Provided, however*, That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employe, or, in case of his death, to his personal representative.

SEC. 4. That no action shall be maintained under this Act, unless commenced within one year from the time the cause of action accrued.

SEC. 5. That nothing in this Act shall be held to limit the duty of common carriers by railroads or impair the rights of their employes under the safety-appliance Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three.

Approved June 11, 1906.